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In The

Supreme Court of the United States

October Term, 1993

RICHARD GRAFF,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a city ordinance requiring the prior grant of a permit to distribute expressive material on public sidewalks immune from facial challenge as a prior restraint under the First Amendment to the United States Constitution because it regulates the operation of newsstands?

2. Are the procedural protections set forth in *Freedman v. Maryland* and its progeny only required where the legislative scheme (1) allows for a decision to engage in a prior restraint as an exercise of completely standardless discretion, or (2) contains no time limits within which to act on a permit request?

3. Are criteria for granting or denying a permit sufficiently narrow, objective and definite for purposes of the prior restraint doctrine where the decisionmaker is allowed (1) completely unfettered discretion to determine whether to issue permits, and (2) significant discretion to determine facts and make judgments about whether the applicant's newsstand is aesthetically pleasing and otherwise meets the requirements of the ordinance?

4. Can an ordinance that burdens the exercise of a fundamental right be tested under a "rational basis" standard under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

5. Did the court below err in upholding the city's ordinance as a reasonable time, place and manner restriction in the absence of a factual record: (a) establishing the city's interest in regulating newsstands in the manner

QUESTIONS PRESENTED – Continued

chosen, (b) showing that the manner chosen was narrowly tailored to meet the city's compelling or substantial interest, (c) showing that the ordinance allowed for ample alternative means of communication, and (d) establishing a factual basis for the ban on types of expressive materials that may be sold from newsstands?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Graff, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, entered in the above-entitled proceeding on November 24, 1993.

OPINIONS BELOW

The opinions of the majority and dissent of the panel of the United States Court of Appeals for the Seventh Circuit are reported at 986 F.2d 1055 and are reprinted in

[1] Richard M. Daley, the Mayor of the City of Chicago, was also sued, but solely in his official capacity. Petitioner has not appealed from the district court's dismissal of Mayor Daley from this case.

the appendix at pp. 80-136. The *en banc* plurality opinion of the Seventh Circuit, together with two concurring opinions and one dissenting opinion, are reported at F.3d 1309 and are reprinted in the appendix at pp. 1-79.

The memorandum opinion announcing the decision of the United States District Court for the Northern District of Illinois (Lindberg, J.) granting respondent's motion to dismiss is reported at 800 F.Supp. 576 and is reprinted in the appendix at pp. 137-154.

JURISDICTION

Petitioner brought this suit in the Northern District of Illinois challenging respondent's ordinance requiring permits for the operation of newsstands on public property, under the First Amendment to the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983. The district court's jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343.

Respondent filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that petitioner's First Amended Complaint failed to state a claim.[2] On May 28, 1992, the district court entered an order granting respondent's motion in part and denying it in part, dismissing two of the petitioner's three counts in his first amended complaint with prejudice.[3] A judgment was issued dismissing the two counts on May 28, 1992.

Petitioner took an appeal from the dismissal of his claims for injunctive relief. The United States Court of Appeals for the Seventh Circuit had jurisdiction of the

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[2] Counts I and II of the First Amended Complaint sought declaratory and injunctive relief to prevent enforcement of the City's recently amended newsstand ordinance. Count III is a claim for damages arising out of the enforcement of the predecessor ordinance regulating newsstands.

[3] Count III is still pending before the district court.

appeal pursuant to 28 U.S.C. § 1292(a)(1). A panel of the Seventh Circuit heard the case and issued an opinion on February 16, 1993, reversing the district court's decision and remanding the case for entry of a permanent injunction prohibiting enforcement of the ordinance. Respondent sought and was granted a rehearing of the case and the Seventh Circuit, sitting *en banc*, after rehearing issued its opinion and judgment on November 24, 1993. No rehearing of that judgment was sought.

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances. U.S. Const. Amend. I.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.

Municipal Code of the City of Chicago, §§ 10-28-130 through -192.

The ordinance is reprinted in the appendix at pp. 157-169.

STATEMENT OF THE CASE

This is a civil rights action brought by Petitioner Richard Graff, the owner and operator of a newsstand

located on a public sidewalk in the City of Chicago, seeking a declaration that respondent City of Chicago's ordinance regulating the operation of newsstands on the public way and in other public places violates the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On February 20, 1991, petitioner filed a complaint alleging that respondent's ordinance regulating newsstands and its refusal to issue a permit for the operation of his newsstand violated his rights under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution. R. Doc. 1-1, p. 1. This complaint alleged that the newsstand had been in operation on the public sidewalk near the Randolph Street entrance to the City of Chicago Cultural Center (previously the Chicago Public Library) for more than seventy years. R. Doc. 1-1, p. 3 ¶ 12. The complaint further alleged that petitioner had owned and operated the newsstand at that location from July, 1984, selling a wide variety of publications, including daily and weekly newspapers and magazines. R. Doc. 1-1, p. 4 ¶ 13.

After the initial complaint was filed respondent substantially amended the ordinance. Municipal Code of the City of Chicago ("MCC"), §§ 10-28-130 through 10-28-192; reprinted herein at App. 157-169. Petitioner filed his First Amended Complaint on September 11, 1991, R. Doc. 20, alleging that the new ordinance violated the First Amendment and the Equal Protection Clause.

The new ordinance prohibits the issuance of any new permits on or after its effective date, thereby arbitrarily limiting the number of total permits that respondent will issue for newsstands. R. Doc. 20, ¶ 12b. At the time that this cap was established, there were many newsstands operating without permits in the City of Chicago. R. Doc. 20 ¶ 21. Indeed, petitioner applied for and was denied a permit on at least three separate occasions prior to the filing of his lawsuit. R. Doc. 20, ¶ 15. Further, all existing

permits expired by no later than January 1, 1992. R. Doc. 20, ¶ 12d. The Commissioner of Public Works[4] is given complete discretion to reissue all or none of the existing permits. App. 157-158, ¶ 10-28-135. The ordinance contains no standards governing the exercise of this discretion.

The new ordinance also limits the materials that may be sold from newsstands to "newspapers, periodicals and similar publications." App. 164, ¶ 10-28-180. An applicant who proposes to sell other expressive materials, like books, pamphlets or bumperstickers, would be denied a permit as such sales do not comply with the ordinance. App. 159, ¶ 10-28-160(a). A newsstand operator who actually sold such material could have his permit revoked or not renewed once it expired. App. 161, 164, ¶¶ 10-18-160(b)-10-28-180. Petitioner sells and wishes to sell other types of expressive materials, including books, pamphlets, posters and like materials. R. Doc. 20, ¶ 28.

If the Commissioner elects to issue an existing permit, the ordinance contains vague and subjective standards by which he is to judge applications for such permits. App. 159-161, ¶ 10-28-160(a). Among these standards are whether the newsstand will "comport with and enhance the quality and character of the streetscape." App. 159-160, ¶ 10-28-160(a). In addition, the Commissioner is charged with determining generally whether the newsstand and application for permit are in compliance with the ordinance. App. 158, § 10-28-150. This determination is made in all cases of initial application as well as permit renewal. App. 158, 161, §§ 10-28-150, 10-28-160(b).

Any permit that is issued is valid for a period of one year only. App. 162, ¶ 10-28-165(b). Any permit holder

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[4] Some time after the enactment of this ordinance, the City of Chicago's Department of Public Works was renamed the Department of Transportation. For convenience, references to the Department and its Commissioner will adhere to the language of the ordinance.

wishing to renew his permit must reapply to the Commissioner of Public Works. *Id.* The Commissioner may reissue the permit for additional years if he concludes that the application and newsstand are in compliance with the ordinance. App. 161, ¶ 10-28-160(b). The ordinance contains no procedures for judicial or other review of the Commissioner's decisions regarding whether to issue existing permits, whether to grant an application for a permit, whether to revoke a permit, or whether to refuse renewal of a permit.

Based upon these provisions of the new ordinance, petitioner alleged in Count I of his First Amended Complaint that the licensing scheme constituted an unlawful prior restraint on his exercise of rights guaranteed by the First Amendment. R. Doc. 20, ¶ 60 a-k. In Count II, petitioner alleged that the City violated his rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment as respondent filed a motion to dismiss the First Amended Complaint. R. Doc. 40.

After filing his amended complaint, petitioner sought documents previously ordered produced and the deposition of an official of the Department of Public Works who had testified regarding the new ordinance prior to its enactment by the City Council. R. Doc. 26. Arguing that its motion to dismiss raised solely issues of law, respondent filed a motion to stay discovery pending a ruling by the district court on this motion. R. Doc. 36. The motion to stay discovery was granted, and the parties filed their briefs in support of and opposition to the motion to dismiss. R. Doc. 40, 41, 43, 44, 47.

Prior to a ruling on the motion to dismiss, respondent served petitioner with a notice commanding him to remove his newsstand from the public way. In response, petitioner filed a motion for a temporary restraining order and preliminary injunction. R. Doc. 55. This motion was denied as moot upon the district court's decision to grant respondent's motion to dismiss Counts I and II of the First Amended Complaint with prejudice. R. Doc. 58, 59. Following entry of this order, the district court

entered judgment on Counts I and II of the First Amended Complaint. R. Doc 60.

Petitioner filed an appeal from the dismissal of Counts I and II of the First Amended Complaint.[5] In an opinion issued February 16, 1993, a majority of a panel of the Seventh Circuit reversed, holding that the ordinance on its face violates the First Amendment to the United States Constitution. In reaching this holding, the majority concluded that the ordinance was an unconstitutional prior restraint under the First Amendment as it does not contain the requisite procedural safeguard of prompt judicial review following a decision to deny a permit.

The Seventh Circuit granted respondent's request for rehearing and reheard the case *en banc* on June 2, 1993. App. 155. The full court issued its judgment and opinion in favor of respondent and affirmed the district court's dismissal of Counts I and II of the First Amended Complaint. App. 1-79. A plurality of the court held that the First Amendment was not implicated as petitioner had no right to construct a newsstand on public property. App. 8-17. The plurality further held that there was no prior restraint as the ordinance contained some provisions governing the exercise of discretion, that the type of discretion which could be exercised by respondent in denying or revoking permits did not allow for the exercise of content-based discrimination, that the ordinance was a reasonable time, place and manner restriction, that respondent has a legitimate interest in limiting the type of publications sold by a newsstand, and that the ordinance passed muster under a rational basis equal protection analysis.

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[5] Petitioner sought and received an injunction prohibiting respondent from enforcing its ordinance against him during the pendency of his appeal. R. Doc. 82. Following the decision on rehearing *en banc*, the Seventh Circuit stayed its mandate and continued this injunction pending further order of the court. R. Doc. 93.

Two concurring opinions were filed which were joined by four judges. Each concurring opinion rejected the notion that the First Amendment was not implicated because the ordinance is a scheme requiring receipt of a permit before engaging in the distribution of expressive material from newsstands. Nevertheless, each opinion concluded that respondent's exercise of discretion was sufficiently fettered to obviate the need for the procedural safeguard of prompt judicial review of decisions to grant or deny permits. Although each concurring opinion found that a First Amendment right was involved, neither opinion discussed the differential treatment of this protected activity and the non-protected uses of the public forum. Three judges dissented from the plurality opinion, concluding that the ordinance allowed an unconstitutional prior restraint on the exercise of speech without the adequate procedural safeguards mandated by opinions of this Court.[6]

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[6] In one concurring opinion, Judge Ripple, writing for himself and two other judges, opined that the case "presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States." App. 59. This problem really has two parts: (1) Whether and when the procedural safeguards mandated by this Court's opinion in *Freedman v. Maryland*, 380 U.S. 51, 56 (1965), and its progeny need to be incorporated in a legislative scheme licensing speech, and (2) When are the standards set forth in such a scheme sufficiently narrow, definite and objective to save the ordinance from a finding that it violates the First Amendment? Confusion about these two issues led these three judges to submit "that there is a great need for clarification of standards in this area" and to "respectfully submit that this case is deserving of further review in the Supreme Court of the United States." App. 64.

REASONS FOR GRANTING THE WRIT

I.

THE PLURALITY'S HOLDING THAT AN ORDINANCE REGULATING THE OPERATION OF NEWSSTANDS DOES NOT IMPLICATE THE FIRST AMENDMENT IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

This case presents an important question of federal constitutional law that should be decided by this Court. The ordinance at issue regulates the distribution of publications through newsstands which are located on the streets of the City of Chicago. In regulating the use of this "archetype of a traditional public forum," respondent has enacted a scheme that allows a single government bureaucrat to deny access to certain speakers and messages in his complete discretion. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). This can be accomplished under the ordinance by the simple expedient of denying a person the permit he needs to operate such a newsstand. This power to completely foreclose speech for certain speakers and certain messages in the public forum at the discretion of a single official, without sufficient standards guiding that discretion and without the check of subsequent and prompt judicial review, poses a grave risk to the First Amendment that should be addressed by this Court.

The plurality opinion decided that the First Amendment is not implicated in this case because: "[t]he building of a newsstand is simply not a form of constitutionally protected expression." App. 10-11. From this proposition, the plurality concluded that: "[r]equiring a permit for the structure is not a prior restraint on speech." App. 11. Viewing the ordinance as merely one that regulates the construction of structures on the public way, the plurality sought to remove from First Amendment scrutiny a case of regulation directed at "expression or . . . conduct commonly associated with expression" in

a public forum. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988).

In attempting to distinguish *Lakewood*, the plurality purported to reach a question left undecided in that case. The plurality held that a flat ban on all newsstands would be constitutional, and that, therefore, respondent was free to engage in selective licensing of those who are allowed to communicate through newsstands without violating the First Amendment. This analysis is nothing more than an adoption of the dissent's analysis in *Lakewood* as applied to newsstands. As such, it is in clear conflict with the applicable opinions of this Court.

In *Lakewood*, as in this case, the municipality did not enact a flat ban on a particular mode of communication. Rather, the ordinances in both cases require a permit as a prerequisite to engaging in that mode of communication in the public forum. In *Lakewood*, it was newsracks; in the instant case it is newsstands. In the absence of a flat ban, the initial issue to be addressed under the *Lakewood* analysis is whether the ordinance is an unconstitutional prior restraint which violates the First Amendment, and not whether the ordinance is a reasonable time, place and manner restriction.

This point was made quite clearly in this Court's opinion in *Lakewood*:

> "Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place and manner test. The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to speech justifies this silence . . . In contrast, a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship . . . Therefore,

> even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion."

Lakewood, 486 U.S. at 763-764. (citations and internal quotation marks omitted). In short, the plurality asked the wrong question; in the absence of a flat ban on newsstands, the proper initial inquiry is: Whether a scheme permitting expression in a particular manner for some and not for others in a public forum is an unconstitutional prior restraint? As this case involves the discretion to grant some and not others the right to use the public forum, it raises the problem identified in *Lakewood*, a problem that this Court has held can not be resolved under a time, place and manner test.

In attempting to distinguish *Lakewood*, the plurality discusses at some length why it believes newsstands differ from newsracks. App. 11-17. This distinction centers on two features: the size of newsstands and the fact that they carry a variety of publications. *Id.* It is argued that these differences make newsstands a less inviting target for content discrimination, and that therefore, newsstand operators are not in need of the protection offered by the prior restraint doctrine. App. 16. Even if this distinction between newsstands and newsracks were correct, it does nothing to vitiate the problem posed by this ordinance: the discretionary power to deny access to the public forum to certain speakers.

Moreover, the same risk of censorship that was present in *Lakewood* is present in this case. Like the ordinance in *Lakewood*, the instant ordinance has two features which, in combination, pose both a risk of self-censorship and of undetectable censorship: It is a regulatory scheme that is, (1) directed "narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers," and in this case, other expressive materials, and (2) requires the operator to

annually secure a license renewal from the government official regulating newsstands. *Id.* at 759-760.[7]

In purporting to reach a question left undecided in *Lakewood*, the Seventh Circuit has actually failed to follow this Court's opinion in that case and other recent cases. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (ordinance licensing sexually oriented businesses, some of which distribute expressive material, properly tested under prior restraint analysis and not as a reasonable time, place or manner restriction); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (licensing of professional fundraisers properly analyzed as prior restraint).

Newsstands are an important means for the dissemination of speech that is at the core of the First Amendment, particularly in major metropolitan areas. App. 78 (Cummings, J. dissenting) (citing amicus curiae brief in support of petitioner filed by Chicago Tribune, Chicago Sun Times and USA Today). Thus, the question of what standard is appropriately applied in assessing the regulation of newsstands is of great importance. This Court should grant certiorari to make clear that prior restraint analysis applies when government attempts to license a particular mode of expression in a manner that allows a government bureaucrat to deny, in advance, use of the public forum to particular speakers and messages.

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[7] Whether respondent could ban newsstands altogether is a question not posed by this case for the simple reason that respondent has not chosen to do so. Thus, like the dissent in *Lakewood*, the plurality reaches an issue not necessary for the decision in this case. Even if this question had been properly reached by the plurality, its conclusion that newsstands are less in need of protection from covert content-based discrimination is not only without any factual basis in the record, but is also incorrect. As the concurring and dissenting opinions note, the risk of censorship in the licensing of newsstands is quite real. App. 44-45, footnote 2; App. 59-60; App. 68-71.

II.

THE SEVENTH CIRCUIT ERRED IN CONCLUDING THAT THE PROCEDURAL SAFEGUARDS MANDATED BY *FREEDMAN V. MARYLAND* AND ITS PROGENY ARE ONLY REQUIRED WHERE A LICENSING SCHEME GIVES A GOVERNMENT OFFICIAL TOTALLY STANDARDLESS DISCRETION TO GRANT OR DENY A PERMIT. THERE IS A DIVISION IN THE CIRCUITS THAT REQUIRES RESOLUTION BY THIS COURT.

A majority of the Seventh Circuit held that the procedural requirement of prompt judicial review mandated by *Freedman* and its progeny does not apply to the type of licensing ordinance challenged in this case. The question of whether and when the *Freedman* safeguards must be included in a licensing scheme, and the precise nature of those requirements in light of *FW/PBS v. City of Dallas* require resolution by this Court.

In a number of prior cases, this Court has defined those circumstances under which a prior restraint can pass constitutional muster. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975). In each of these prior cases, this Court found that the ordinance or other law granting the power to foreclose speech in advance must contain certain substantive and procedural safeguards to minimize the risk of censorship or self-censorship that the power of prior restraint allows. These safeguards, articulated in *Freedman* and other cases, require that the licensing scheme contain the following provisions: (1) "Narrow, objective and definite standards to guide the licensing authority" in exercising its discretion to determine whether to grant or deny a permit, *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969), and, (2) Stringent procedural safeguards. *Freedman*, 380 U.S. at 58-60. The requirement of procedural safeguards is "unrelated to the standard" to be applied in determining whether to issue a license; the absence of *either*

narrow and objective standards *or* adequate procedural safeguards will lead to a finding of unconstitutionality. *Southeastern Promotions*, 420 U.S. at 562.

The procedural safeguards that must be included have been defined in a number of cases. *FW/PBS*, 493 U.S. at 228; *Southeastern Promotions*, 420 U.S. at 561-562; *Freedman*, 380 U.S. at 58-60. The safeguards are: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 227. A majority of this Court applied these procedural safeguards to the licensing scheme in *FW/PBS* with one exception: three justices held that the licensor need not bear the burden of going to court nor the burden of proof once in court. *Id.* at 230.[8]

In this case, the Seventh Circuit failed to apply either the *Freedman* test or the modified test set forth in *FW/PBS*. While the plurality and concurring opinions reached the same conclusion with respect to this issue, they did so for radically different reasons.

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[8] *FW/PBS* is a plurality opinion. Three of the justices held that only two of the three *Freedman* criteria, brief restraint prior to judicial review with preservation of the status quo and expeditious judicial review, were required under the facts of that case. Three other justices concurred in the judgment, but would have held that all three *Freedman* criteria, including imposing the burden of going to court and the burden of proof on the licensor, must be contained in the ordinance. In this case, it is not necessary to decide whether the two *Freedman* safeguards found to be adequate in *FW/PBS* would also be adequate under this ordinance, as respondent had failed to include *any* of the three safeguards in its licensing scheme. This case would, however, provide an appropriate opportunity for the Court to clarify the reach of its holding in *FW/PBS*.

In the minds of the plurality, "it is not clear why the Court in *Freedman* set out the apparent requirement that an ordinance such as this explicitly provide for prompt judicial review." App. 35. Finding a lack of clarity in this Court's precedent, the plurality ignored that precedent, and simply found that the procedural safeguards are not required. For the plurality, the presence of review under state law by common law *certiorari* satisfies the requirements of the Constitution, notwithstanding that this position was rejected by this Court in *FW/PBS*. *FW/PBS*, 493 U.S. at 248, White, J. concurring in part, dissenting in part.

The concurring judges, less comfortable with this bold rejection of precedent, have chosen an equally unsatisfactory analytical route around what the dissent aptly describes as a "constitutional wall." App. 72 (Cummings, J. dissenting). The concurring opinions conclude that the *Freedman* safeguards are not required in the absence of completely standardless discretion, or the absence of a time limit within which the decisionmaker must act on the permit application. App. 50, 63. This position misreads applicable law, as this Court has never stated that the *Freedman* procedural safeguards are necessary only where totally standardless discretion is exercised. Indeed, reading the cases in this way is devoid of logic. If an ordinance gives the decisionmaker truly standardless discretion, it is obviously unconstitutional.[9] Under such circumstances, an inquiry into the presence of procedural safeguards would be completely unnecessary to a finding of unconstitutionality. The prior restraint cases only make sense if they are read to require *both* narrow, definite and objective standards *and* procedural safeguards. *Southeastern Promotions*, 420 U.S. at 559.

The procedures set forth in the instant ordinance for challenging adverse licensing decisions are not constitutionally adequate. The ordinance vests absolute authority in one official, the Commissioner of Public Works, to

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[9] This was in fact recognized by a majority of the Seventh Circuit. App. 48, 63, 70-73.

make the licensing decision. App. 157-168, ¶¶ 10-28-135(b)-10-28-191. The only mandatory subsequent review of an adverse licensing decision is by the self-same official, and the only criterion for review is whether he believes that his own prior determination was correct. App. 161-162, ¶ 10-28-160(c). There is no provision to ensure prompt judicial review of the administrative decision and no provision preserving the status quo. App. 161-168, ¶¶ 10-28-160(c)-10-28-191.

The mere general availability of judicial review is insufficient under *Freedman* and the subsequent cases regarding prior restraint. Judicial review on the merits must also be swift, including immediate appellate review. *FW/PBS*, 493 U.S. at 227; *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977). This Court has noted that review on the merits within five months of an adverse decision is not sufficiently swift,[10] *Southeastern Promotions*, 420 U.S. at 561-562, and has cited with approval a legislative scheme that provides for a hearing one day after joinder of the issues, with the judge being required to issue his decision within two days thereafter. *Freedman*, 380 U.S. at 60.

In addition to requiring prompt judicial review, the decisions of this Court require that the licensor stay the effect of its decision pending that full judicial review. *National Socialist Party*, 432 U.S. at 44 ("If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay." [citations omitted]). The ordinance wholly fails to preserve the status quo pending judicial review. In the case of existing newsstands, such as petitioner's, the ordinance does not provide that respondent will forbear from

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[10] Given the current backlog of cases in the court systems of many major urban areas, including the Circuit Court of Cook County, Illinois, absent an express expedited procedure, resolution of an appeal within as little a time as five months would be almost unprecedented.

removing those stands from the public way while judicial review of its decision is on-going.[11]

Because of the importance of this issue, the division in the circuits, and the obvious need for clarification of whether and when the *Freedman* procedural safeguards are required in a licensing ordinance, the writ of certiorari should issue.

III.

THE SEVENTH CIRCUIT ERRED IN CONCLUDING THAT THE CRITERIA FOR GRANTING OR DENYING A PERMIT UNDER THE ORDINANCE ARE SUFFICIENTLY NARROW, SPECIFIC AND OBJECTIVE TO PASS MUSTER UNDER THE PRIOR RESTRAINT DOCTRINE. THE HOLDING IN THIS CASE IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT REGARDING THE REQUIREMENTS FOR SUCH CRITERIA.

In addition to the procedural safeguard of prompt judicial review, decisions of this Court have required that the ordinance contain "narrow, definite and objective" standards to guide the licensing official in his determination. *Shuttlesworth*, 394 U.S. at 150-151 (1969). Absent such standards, the power to censor based on content without any means of effective judicial review is simply too great. The ordinance in this case suffers from the vice of standardless discretion in the bureaucrat's initial decision regarding whether to even issue available permits, as well as the vice of containing vague and subjective standards to be utilized in evaluating whether an applicant is in compliance with the ordinance. These twin vices should have led to a finding that the ordinance is

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[11] The majority holding that procedural safeguards are only required where standardless discretion is exercised is also at odds with the decisions of other circuits. *See Sentinel Communications Company v. Watts*, 936 F.2d 1189, 1199 (11th Cir. 1991) (both procedural safeguards and neutral criteria are required).

unconstitutional; this Court should grant certiorari to clarify when standards are required, and whether the standards at issue are sufficiently narrow, definite and objective to save this ordinance from a finding of unconstitutionality.

In determining whether an ordinance that grants a government official broad discretion to grant or deny permits is a constitutionally valid prior restraint on speech, this Court has long required that the ordinance contain criteria for the grant or denial of permits that are "narrow, definite and objective." *Shuttlesworth*, 394 U.S. at 150-151; *see also*, *Freedman*, 380 U.S. at 56; *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). As the Court recently noted:

> "The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment and the formation of an opinion . . . [] . . . by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted."

Forsyth County, Georgia v. Nationalist Movement, 112 S.Ct. 2395, 2401-02 (1992) (citations and internal quotation marks omitted).

The ordinance in this case delegates broad licensing discretion to one government official. This official is empowered to issue some, all or none of the existing permits for newsstands with no standards whatsoever to guide his exercise of discretion. Thus, the Commissioner has complete discretion at any point in time to deny a permit based upon the identity of the applicant (and the message or messages he wishes to convey) by the simple expedient of refusing to issue any more of the existing permits. Nothing in the ordinance requires the Commissioner to articulate why a decision to refuse issuance of a permit is being made, and there are no standards whatsoever to guide his decision over whether to issue a permit. This lack of standards makes it essentially impossible to determine whether a decision to refuse issuance

of a permit is content-based. This is precisely the type of standardless discretion condemned in *Lakewood*. Indeed, this ordinance has the additional vice that the decision-maker is not even required to articulate a reason for declining to issue an available permit; he may stand on his unfettered right to refuse issuance of any available permits. App. 158, 10-28-135(b).

Moreover, even where the Commissioner elects to exercise this standardless discretion and make a permit available for issuance, he is given broad discretion under vaguely written ordinance criteria to grant or deny a permit to a particular applicant or to make a choice between competing applicants. This vesting of overly broad discretion in the Commissioner of Public Works violates the First Amendment as set forth in a long line of decisions by this Court.

In determining whether to grant or deny a permit to a particular applicant, the Commissioner of Public Works is required to consider "whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses . . . " App. 159, ¶ 10-28-160(a)(1). The ordinance contains no definitions, standards or guidance of any sort regarding how this highly subjective decision is to be made.[12]

Moreover, in determining whether to renew a permit, the Commissioner of Public Works is given the discretion to determine whether "the application and the newspaper stand are in compliance with" the ordinance, thus making

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[12] While local governments certainly have an interest in aesthetics, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981), no court has ever upheld the standardless exercise of discretion under the guise of aesthetic judgment in a prior restraint case. The danger, of course, is not that the bureaucrat will make a bad aesthetic choice, but rather that this vague standard may provide a covert opportunity for content-based discrimination.

the determination under vague and subjective standards a recurring, annual event. App. 161, ¶ 10-28-160(b).

The ordinance in this case suffers from precisely the vice identified in prior cases of this Court: It grants the government bureaucrat wide latitude to exercise judgment, appraise facts and form an opinion regarding whether a newsstand will satisfy his or her own particular notions of what is aesthetically pleasing. Moreover, the ordinance grants this official the complete unfettered discretion to determine whether a permit will be made available for an applicant and whether the applicant's newsstand is (or continues to be, in the case of license renewal) in compliance with the ordinance. Discretion so unfettered leaves ample room for undetectable censorship and poses a serious risk of self-censorship by the license applicant.[13]

The First Amendment requires not only standards, but standards that definitely and objectively limit the decisionmakers discretion. In *Shuttlesworth*, the ordinance under which a parade permit was denied was not completely devoid of standards; it provided that the commission charged with reviewing applications for parade permits "shall grant a written permit for such parade . . .

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[13] In his concurrence, Judge Flaum, while acknowledging that some of the ordinance criteria are vague (particularly the aesthetic criterion noted herein) and hence susceptible to discretionary manipulation, found that the risk of censorship based on content was diminished because renewal of a permit under the ordinance is "automatic." App. 49. There is simply no basis in the record for this comforting conclusion. Indeed, the ordinance, by its terms, requires the Commissioner to exercise discretion and evaluate whether the application and newsstand are in compliance with the ordinance. App. 161, ¶ 10-28-160(b). There is nothing in the ordinance that prohibits this bureaucrat (or his or her successor) from concluding that the newsstand no longer comports with or enhances the streetscape, or carries forbidden publications, or in some other unspecified fashion is no longer in compliance with the ordinance.

unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." 394 U.S. at 149. These are standards; the problem is that they are not sufficiently narrow, definite and objective. *Id. See also, Lakewood,* 486 U.S. at 769-770 (fact that Mayor, in exercise of discretion, was constrained by some standards and had to state reasons for decision was insufficient).

Similarly, in *Forsyth,* this Court held that an ordinance granting the county administrator the power to adjust the amount of a permit fee for the holding of a demonstration based upon his judgment regarding the "expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed[,]" violated the First Amendment. 112 S.Ct. at 2399. The Court held that this prior restraint was unconstitutional as it vested too much discretion in the county administrator to determine the fee based upon his own notions of the "expenses incident" to issuing the permit and the cost of maintaining public order. In so holding, the Court rejected the district court's analysis that the ordinance passed constitutional muster as the criteria utilized by the county were based on content-neutral considerations. *Id.* at 2403. As the Court noted, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, *but whether there is anything in the ordinance preventing him from doing so." Id.* at 2403, footnote 10. In this case, there is nothing to prevent the Commissioner from failing to make a permit available based upon the identity of a prospective applicant and his message, or from refusing to issue or renew a license for the same reasons. The sole check is the theoretical criteria binding the decisionmaking process; these criteria are illusory safeguards as they allow the Commissioner wide latitude to deny permits

based upon his own judgment of aesthetics and other unspecified matters.[14]

In addition, there is a division in the circuits regarding the question of when criteria are sufficiently narrow, definite and objective to allow for a finding that the ordinance is a valid prior restraint. In *Miami Herald Publishing Co. v. City of Hallendale*, 734 F.2d 666 (11th Cir. 1984), the court struck down as violative of the First Amendment an ordinance of general application requiring all persons wishing to operate vending machines on the public way, including newsracks, to apply for and receive a license prior to engaging in that activity. The ordinance granted discretion to an official to determine whether the applicant was in compliance with all "applicable provisions of the City Code." 734 F.2d at 669. This grant of discretion to decide which provisions of the Code were applicable and whether the applicant was in compliance with those provisions rendered this scheme an unconstitutional prior restraint on speech. *Id.* at 674-675.

The instant ordinance contains an almost identical provision in that it allows the Commissioner of Public Works to determine whether the applicant is in compliance with the ordinance. Moreover, the aesthetic criterion and the standardless determination of whether to issue any permits at all give this official much broader discretion to grant or deny permits than the language of the ordinance in *Miami Herald*; *see also*, *Leonardson v. City of East Lansing*, 896 F.2d 190, 197-198 (6th Cir. 1990); and *Beckerman v. City of Tupelo, Mississippi*, 664 F.2d 502, 509 (5th Cir., Unit A, 1981).

The Seventh Circuit's decision in this case appears to be in conflict with decisions of this Court regarding the extent of permissible discretion in administering a prior restraint licensing scheme. There is also a division in the

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[14] For an example of constitutionally affirmed standards with regard to the determination of how much to assess demonstrators for police services, *see Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1134-1135 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 275 (1991).

circuits regarding the extent of such permissible discretion. Therefore, this Court should issue a writ of certiorari to determine whether criteria granting significant discretion to a decisionmaker in a licensing decision are consistent with the First Amendment.

IV.

THE SEVENTH CIRCUIT ERRED IN APPLYING A RATIONAL BASIS TEST UNDER THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSES TO THE DIFFERENTIAL AND MORE ONEROUS TREATMENT OF NEWSSTANDS AS COMPARED TO OTHER USES OF PUBLIC SIDEWALKS NOT ASSOCIATED WITH EXPRESSION.

A majority of the Seventh Circuit found that the ordinance at issue implicated a right guaranteed by the First Amendment. App. 43, 60, 65. Despite this holding, the sole discussion of the claim regarding differential treatment of newsstands and other, non-expressive uses of the public forum like sidewalk cafes, is found in the plurality opinion, which treats the question as one requiring only a rational basis for that differential treatment. App. 38. Although this discussion may follow logically from the plurality's opinion that no First Amendment interest is implicated in this case, it cannot be squared with the majority's finding that regulation of newsstands on the public way does implicate the First Amendment.

When a law burdens the exercise of a fundamental right, more than a rational basis is required to sustain that burden. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Minneapolis Star & Tribune v. Minneapolis Commissioner of Revenue*, 460 U.S. 575 (1983). Under these circumstances, the ordinance must be subjected to strict scrutiny. *Id.*

In this case, the differential treatment of newsstands and other uses of the public forum was challenged as a violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. A comparison

of the provisions of respondent's newsstand ordinance with those of its sidewalk cafe ordinance reveals differential treatment of newsstands, which are constitutionally protected, and sidewalk cafes, which are not. App. 157, 158, 163, 164, 165, ¶¶ 10-28-130, -135(b), -170, -185(b). The sidewalk cafe ordinance does not have a size limitation like the one found in the newsstand ordinance, nor is there a cap placed on the number of sidewalk cafes that may be constructed on the public way. This type of differential treatment of those engaged in First Amendment activities "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune*, 460 U.S. at 585. And, this differential treatment "places a heavy burden on the State to justify its action." *Id.* at 592-593.

The Seventh Circuit chose to analyze this differential treatment under a rational basis test, rather than the appropriate strict scrutiny test. App. 38. The Seventh Circuit should have strictly scrutinized the applicable ordinances before finding this differential treatment constitutional.[15]

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), this Court held that differential treatment of expressive and non-expressive uses of the public forum must be justified under a strict scrutiny standard. 452 U.S. at 72-76; *see also, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506-507 (1981) (commercial speech must be accorded greater protection than non-commercial speech); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). If, as this Court held in *Metromedia*, non-commercial speech must be accorded more protection than commercial speech, it follows, *a fortiori*, that a regulatory scheme that favors non-expressive over expressive uses

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[15] The Seventh Circuit's error in failing to examine the differential treatment under a strict scrutiny test was compounded by its failure to require a factual record in this case justifying the differential treatment. See, discussion in part V. below.

of the public way is likewise constitutionally infirm. *See also, Sentinel Communications,* 936 F.2d at 1206-07 (Requirement that newsrack maintain liability insurance without similar requirement for other vending machine operators selling soft drinks is presumptively invalid).

The plurality's approach conflicts with the applicable decisions of this Court, and therefore, the petitioner's request for a writ of certiorari should be granted.

V.

RESPONDENT SHOULD HAVE BEEN REQUIRED TO PROVE THAT IT HAD A FACTUAL BASIS FOR ITS REGULATION OF NEWSSTANDS IN THE MANNER CHOSEN AND THAT THIS REGULATION OTHERWISE MET, AS A MATTER OF FACT, THE REQUIREMENTS FOR A REASONABLE TIME PLACE AND MANNER RESTRICTION. THE SEVENTH CIRCUIT ERRED IN UPHOLDING THE DISPOSITION OF THIS CASE BY A MOTION TO DISMISS.

The Seventh Circuit held that the ordinance is content neutral and that it is a reasonable time, place and manner restriction. App. 23-29. The appellate court further found that it was appropriate to determine the validity of the ordinance on a motion to dismiss without the benefit of a factual record. App. 29-32. Petitioner has challenged both the content neutrality of the ordinance and the claim that it is a reasonable time, place and manner restriction on the exercise of protected speech, as well as the factual basis for respondent's asserted interests. In concluding that the ordinance is a reasonable time, place and manner restriction, the Seventh Circuit erred in relying on its own judgment of the propriety of the various restrictions in the licensing scheme rather than allowing petitioner an opportunity to develop a factual record to support his claim that the ordinance does not contain reasonable time, place and manner restrictions.

In determining whether a regulation is a reasonable time, place and manner restriction of expression in a public forum, the courts apply a three part test: (1) Whether the

restrictions are justified without reference to the content of the regulated speech, (2) whether the restrictions are narrowly tailored to serve a significant governmental interest, and (3) whether the restrictions leave open ample alternative means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Where the government asserts a compelling interest, and that its regulation is narrowly tailored to serve that interest, it has the burden of proving facts to support those claims. *City of Los Angeles v. Preferred Communication*, 476 U.S. at 491-494; *The Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1523 (11th Cir. 1992); *Chicago Cable Communications v. Cable Commission*, 879 F.2d 1540, 1548 (7th Cir. 1989). Even assuming, *arguendo*, that the ordinance is content-neutral in all of its aspects,[16] the Seventh Circuit erred in concluding, at the pleading stage, that the ordinance was enacted to further significant government interests, that it is narrowly tailored to serve those interests and that it leaves open ample alternative means of communication. This error resulted from the court's reliance on factual matters outside of the pleadings (conjecture under the guise of "common sense") to support these conclusions.

In *City of Los Angeles v. Preferred Communications, Inc.*, the plaintiff, a cable franchise company, asked the defendant city for permission to lease space on utility poles to provide cable service to an area of the city. 476 U.S. at 490. The cable company was advised that it had to first apply to the city for a franchise. *Id.* Upon doing so, the company was denied a franchise as it had failed to participate in an auction for a single cable franchise for the entire area it wished to serve. *Id.*

The cable company sued in federal court alleging, *inter alia*, that the denial of a franchise violated its rights under the First Amendment, and that there was sufficient

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[16] Petitioner has consistently challenged a number of features of the new ordinance as burdens on the content of speech. These include the size limitation and, both in combination with the size limitation and in its own right, the ban on sales of expressive material other than newspapers and periodicals.

excess physical space to accommodate more than one cable company. *Id.* at 491. The city did not deny that this was the case, but "argued that the physical scarcity of available space on public utility structures, the limited economic demand for the cable medium, and the practical and aesthetic disruptive effect that installing and maintaining a cable system has on the public right-of-way justified its decision to restrict access to its facilities to a single cable television company. [citation omitted]." *Id.* The district court dismissed the First Amendment claim and the court of appeals reversed. *Id.*

In affirming the decision of the court of appeals, this Court noted that on the record before it, dismissal of the First Amendment claims on the pleadings was improper. The Court stated as follows:

> "The City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely."

Id. at 494.

In this case, petitioner has challenged the limitation on the number of permits and on the size of newsstands that the City will authorize for permits on the public sidewalks. Petitioner has also challenged the limitation on types of publications that may be sold. With respect to each of these issues, the Seventh Circuit embraced arguments of fact without benefit of any factual record. These "facts" were nothing more than suggestions supplied by respondent's counsel or surmises by the court. The need for a factual record before determination of the validity of a purported content neutral time, place or manner restriction is best illustrated in this case by the Seventh Circuit's disposal of these issues without benefit of a factual record.

Petitioner has never argued that all restrictions on the number of permits in every case is unconstitutional; rather, the allegation is that the number fixed by the City is completely arbitrary as it appears to be based entirely on the number of permits in existence on the effective date of the ordinance. Absent a factual record, it is impossible to conclude that the actual limitation is narrowly tailored to serve the City's alleged interest.[17]

Similarly, the ordinance is silent on the reasons for the maximum size limitations. While there is a finite amount of sidewalk space and other unenclosed areas owned or controlled by the City, there is no record establishing how the size limitation serves the asserted interest in accommodating other uses of these spaces. Indeed, public areas (both sidewalks and other spaces) exist in a variety of sizes and configurations. The size limitation contained in the ordinance applies regardless of the location of the newsstand. The ordinance also contains a provision requiring minimum clearance on the public way. Given this provision, there is no apparent reason for the arbitrary size limitations imposed by the ordinance. Respondent can serve its purported legitimate interests without such restrictions and without unnecessarily diminishing the amount, variety and type of speech that the operator may engage in through newsstands.

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[17] This is particularly true given the fact that prior to the enactment of the new ordinance a great many newsstands, including petitioner's, operated by necessity without permits, because respondent arbitrarily refused to issue them. Respondent's ordinance thus grandfathers in an arbitrary cap on permits, a limit which, contrary to the holding of the Seventh Circuit, is less than the number of existing newsstands. Furthermore, the arbitrary number can be even further reduced by the exercise of standardless discretion of a city bureaucrat. This limitation allows respondent to severely limit the overall quantity of speech in the public forum without ever having had to justify this limitation.

Finally, the ordinance limits the newsstand operator to the sale of newspapers, magazines and similar publications, thereby excluding a wide range of expressive material that are entitled to constitutional protection. Thus, in addition to limiting the overall quantity of speech in the public forum, respondent has arrogated to itself the right to tell speakers the type of expression they will be allowed. Respondent cannot have a legitimate interest in restricting the types of expressive materials that may be sold. Even assuming that such a legitimate interest exists, however, it cannot be supplied by speculation about a desire to "maximize the number of newspapers sold" (respondent's proffered justification for this provision) nor the difference in how consumers purchase newspapers versus books (the justification surmised by the Seventh Circuit). Before content-based distinctions of this type are made, respondent must meet a heavier burden of justification. This justification can only be tested in the context of a factual record regarding the actual reason (if any) for this differential treatment of types of protected speech. App. 26-27. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) (complete ban on circulation of commercial handbills through newsracks not justified by difference between such handbills and other protected materials), and *Riley*, 487 U.S. at 790-91 ("The First Amendment mandates that we presume that speakers not government know best both what to say and how to say it."); *see also, Gaudiya Vaishnava v. San Francisco*, 952 F.2d 1059, 1063-65 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 1951 (1992) (ban on sale of merchandise with political or religious message other than books, pamphlets, buttons, bumperstickers, posters or other items having no value other than to communicate message is unconstitutional); and *754 Orange Ave., Inc. v. City of West Haven, Connecticut*, 761 F.2d 105, 112 and footnote 6 (2d Cir. 1985) (need for evidentiary record in evaluating constitutionality of time, place and manner restriction).

The Seventh Circuit has frequently disposed of cases raising First Amendment issues without the benefit of a

factual record. *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991); *Rothner v. City of Chicago*, 929 F.2d 297 (7th Cir. 1991); *International Caucus of Labor Committees v. City of Chicago*, 816 F.2d 337 (7th Cir. 1987); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990). As this practice is inconsistent with the teaching of *Preferred Communications*, the petition should be granted to clarify when it is appropriate to dismiss First Amendment claims without a particularized factual inquiry.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant the petition for Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2352

RICHARD GRAFF,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, an Illinois corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 1056 – **George W. Lindberg, *Judge.***

ARGUED JUNE 2, 1993 – DECIDED NOVEMBER 24, 1993

Before Posner, *Chief Judge*, and CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

MANION, *Circuit Judge.* For nearly seventy years a newsstand has stood in front of the City of Chicago Cultural Center (formerly the Chicago Public Library). The plaintiff, Richard Graff, has operated his newsstand there since July 1984, when he purchased the stand for over fifty thousand dollars. This case concerns a City of Chicago municipal ordinance designed to force newsstand operators, such as Graff, to either acquire a permit

or face eviction. Chicago threatened to remove Graff from his location. Rather than request a permit, Graff ultimately sought relief in the federal district court, with a facial challenge to the ordinance. The district court denied Graff's request to enjoin Chicago's proposed enforcement of the ordinance. For the following reasons, we affirm.

I. Background

From all indications Graff's predecessors had no ownership or property rights to the newsstand. Such newsstands seemed to have operated on public property by sheer acquiescence. At the time Graff purchased the newsstand, Chicago ostensibly required newsstand operators to acquire permits. We say ostensibly, because Graff asserted that then and now newsstands have operated on the public way without permits and only Graff has been targeted for eviction.

Under what we shall call the old ordinance, these permits were issued at the discretion of the commissioner of streets and sanitation, and the mayor could revoke a permit at any time. The old ordinance provided that such newsstands could only sell Chicago papers, and provided the mayor with no standards to guide his discretion. It also lacked hearing procedures to review the decisions to deny or revoke a permit. Chicago Mun. Code §§ 10-28-130 to -190. Graff attempted to apply for a permit under the old ordinance without much success, although Chicago continued to issue permits for newsstands at other locations.

In November 1990, Chicago gave Graff two months' notice to remove his newsstand from the public way. This order was later rescinded. Graff, however, had had enough. On February 20, 1991, he filed a complaint against Chicago and Mayor Daley alleging that the old ordinance violated the Commerce Clause and the First and Fourteenth Amendments to the United States Constitution.[1] He sought injunctive relief, compensatory damages and attorneys fees. Rather than defend the old ordinance, on June 28, 1991, Chicago amended it. Chicago Mun. Code §§ 10-28-130 to -192 (1991). The defendants thereafter moved to dismiss the complaint arguing the new ordinance corrected the constitutional deficiencies that Graff had identified in his complaint. The court dismissed the case without prejudice. Rather than apply for a permit under the new ordinance, on September 11, 1991, Graff amended his complaint and attacked the new ordinance on its face. The complaint sought comprehensive relief: declaratory, preliminary and permanent injunctions, compensatory damages and attorneys fees under the First and Fourteenth Amendments.

Broadly speaking, in count one Graff alleges that Chicago's permit ordinance constitutes an unlawful prior restraint of free speech. In count two he alleges that the new ordinance violates the Equal Protection Clause because other, non-expressive uses of the public way (such as sidewalk cafes) are treated more favorably than

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[1] Mayor Daley was sued only in his official capacity. Graff does not appeal the district court's dismissing Mayor Daley from the case. *See Kentucky v. Graham*, 473 U.S. 159 (1985) (official capacity suits are essentially against the municipality).

newsstands. In count three he alleges that the old ordinance denied him equal protection of law under the Fourteenth Amendment. In 1987 Graff moved his newsstand from the east side of the Cultural Center to the west side entrance off of Randolph Street to accommodate construction of the underground Pedway Tunnel. Under count three he seeks to recoup the expenses of having had to move his newsstand and certain architectural expenses he incurred when filing his application for a permit under the old ordinance.

Again, Chicago moved to dismiss. Before the court ruled on the motion, on May 14, 1992, Chicago again notified Graff that it intended to remove his newsstand in fifteen days. Chicago had consistently objected to the size of the newsstand and had requested that it be built out of steel rather than wood. Graff filed an "Emergency Motion for Temporary Restraining Order and for Preliminary Injunction." The motion had the effect of quickly forcing the court's hand. On May 28, 1992, the court dismissed counts one and two and denied injunctive relief entirely.

The court initially found that the complaint could be read to raise an as-applied and a facial challenge to the new ordinance. But because Graff had not applied for a permit under the new ordinance, the court concluded that only a facial challenge was before it. As to count one, the court concluded that the new ordinance was content-neutral and did not raise the threat of self-censorship as enunciated in *City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988). The court also concluded that the new ordinance contained reasonable time, place and manner restrictions necessary to accommodate the multiple uses of the public way, and contained adequate procedural safeguards. As

to count two, the court ruled that Chicago could establish size limitations for newsstands, even though it did not do the same for sidewalk cafes. The court ruled that the municipal code did not support Graff's allegation that the landmark commission treated newsstands differently than other structures that visibly affected landmark property. Because Graff could not show a substantial likelihood of success on the merits, the district court denied Graff's motions for injunctive relief. Count three dealing with the old ordinance remains alive in the district court.

While Graff appealed the dismissal of counts one and two, he applied for a permit to operate two newsstands in front of the Cultural Center. Because of the location, Graff had to first seek permission from the Commission on Chicago Historical and Architectural Landmarks. That application was denied on August 13, 1992, because the newsstands would compromise the architectural integrity of the adjoining landmark building. On August 14, 1992, Chicago again notified Graff that he had fifteen days to remove his newsstand. Graff sought an injunction in this court, which we promptly dismissed. We directed him to file the matter in the district court pursuant to Fed. R. App. P. 8(a). After the district court denied him relief, on September 16, 1992, we granted Graff's motion and enjoined Chicago from destroying the newsstand pending appeal.

On February 8, 1993, after oral argument but before decision, Chicago moved to dissolve the injunction because of planned rehabilitation of the Cultural Center. Chicago had hoped to replace the handicap access ramp, and clean and remodel the exterior stonework. On February 16, 1993 a panel of this court issued its opinion

reversing the district court because the new ordinance failed to provide sufficient judicial oversight, in violation of the First Amendment as espoused in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990). *See Graff v. City of Chicago*, 986 F.2d 1055 (7th Cir. 1993). Chicago's motion to dissolve the injunction was denied as moot. On April 15, 1993, this court granted Chicago's petition for rehearing *en banc* and vacated the panel opinion. After *en banc* review, we now affirm.

II. Jurisdiction

In his complaint, Graff requested a preliminary injunction. He did not press the district court for an early hearing apparently because Chicago had not yet moved the bulldozers in for the kill. On May 14, 1992, however, Chicago notified Graff that he had fifteen days to vacate. A week later Graff filed an "Emergency Motion for Temporary Restraining Order and for Preliminary Injunction." Within the week the court dismissed counts one and two, and denied all injunctive motions as moot. In his notice of appeal, Graff sought review of the district court's order "denying the plaintiff's motion for a temporary restraining order, and granting, in part, defendant's motion to dismiss plaintiff's first amended complaint."

Initially, the City argues that we lack jurisdiction to hear this appeal because one count remains alive in the district court, and therefore, final judgment has not been entered. However, 28 U.S.C. § 1292(a)(1) grants us jurisdiction to hear certain interlocutory appeals, as when the district court refuses to enter an injunction. Here, the

district court did just that; it refused to enter an injunction in favor of Graff by dismissing counts one and two of the complaint. *Holmes v. Fisher*, 854 F.2d 229, 230 (7th Cir. 1988). It does not matter that Graff also sought review of the denial of his temporary restraining order (which is not yet appealable). *See Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Ass'n*, 964 F.2d 599, 600 (7th Cir. 1992) (per curiam). Therefore, we have jurisdiction to review the district court's refusal to enter an injunction and whether the district court properly dismissed counts one and two.

III. Analysis

This case essentially involves two interdependent questions: whether the district court should have enjoined Chicago from removing Graff's newsstand and whether Chicago's newsstand ordinance is constitutional. We conclude that the statute is constitutional. Also, the district court acted properly in refusing to enter a preliminary injunction and in dismissing counts one and two. Graff attempts to have Chicago's newsstand ordinance declared unconstitutional in the hope that his newsstand stays put. However, without the newsstand ordinance, Graff still has no right to operate his newsstand on public property. Contrary to Graff's contentions about speech, this case involves a structure. Graff has no First Amendment right to build a structure on public property. The district court also acted properly in dismissing Graff's challenges to the new ordinance. The ordinance does not allow Chicago the opportunity to grant or deny newsstand permits because of the personal or institutional views of a government official. To the extent that the

ordinance restricts the types of publications sold from a newsstand, the restrictions are reasonable. The ordinance contains reasonable time, place and manner restrictions, justified without reference to speech content, and leaves open alternative avenues to communicate the same information. We also conclude that the ordinance contains sufficient judicial review provisions and passes muster under Equal Protection analysis.

A. Newsstand Structure

1.

Chicago has passed numerous ordinances attempting to deal with the myriad of problems that arise on its public way, from carnivals to snow removal. Chicago Mun. Code §§ 10-28-010 to -800. Chicago asserts that this ordinance prohibits all vendors from building structures on the public way; newspaper vendors can erect a structure only after obtaining a permit. As a general starting point, unless another ordinance specifically authorizes otherwise, "no person shall erect or place any building, structure, or other stationary object, in whole or in part, upon any public way or other public ground within the city." *Id.* at -040. There are exceptions. "It shall be unlawful for any person to erect, place or maintain in, upon or over any public way or other public place in the city, any [stand] . . . for the display or sale of goods, wares or merchandise . . . unless a permit for the same shall be obtained form the superintendent of compensation. . . ." *Id.* at -050. Specifically for newspaper vendors,

> It shall be unlawful for any person to erect, locate, construct or maintain any newspaper

> stand on the public way or any other unenclosed property owned or controlled by the city without obtaining a permit therefor from the commissioner of transportation as hereinafter provided.

Id. -130. In this case the parties have focused their arguments in the district court and on appeal on the constitutionality of Chicago's newsstand permit ordinance, *id.* at -130 to -196. Graff sought an injunction to prevent Chicago from removing his newsstand under the supposition that if the permit ordinance were declared unconstitutional, his newsstand should stay. But even without the challenged newsstand ordinance, Graff still has no right to occupy the public sidewalk; that is, unless he has a constitutional right to build or maintain a newsstand on public property. If the ordinance goes down (along with the availability of a permit) the newsstand goes down as well. As a preliminary matter, then, we must examine whether he has an independent constitutional right to erect his newsstand on the public sidewalk.

In *Lakewood* the city had "absolutely prohibited the private placement of any structure on public property." 486 U.S. at 753. The district court found that this prohibition violated the First Amendment as applied to newsracks. The city, however, did not appeal; rather, it enacted ordinances that permitted newsracks under certain conditions. The Supreme Court concluded that the new ordinances placed too much discretion with the city officials, thus rendering the ordinances unconstitutional. The Court did not reach the question of whether "a city may constitutionally prohibit the placement of newsracks on

public property." *Id.* at 762 n.7. Today, with regard to newsstands, we reach that question.

At the outset we note that no person has a constitutional right to erect or maintain a structure on the public way. In *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990), the City had decorated O'Hare Airport with Christmas trees and other ornaments; persons desiring to display religious symbols were allowed to lease an area of the airport. The Lubavitch Chabad House, however, did not want to pay. The organization sought to display a free standing Chanukah menorah in one of the public areas. We held that the ordinance did not involve any form of constitutionally protected speech. *Id.* at 347. There is no

> private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.

Id.; accord Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 813-15 (1984).

Two years after we decided *Lubavitch*, the Supreme Court ruled that an airport was not considered a traditional public forum. The *Lubavitch* rule nevertheless stands that even in a public forum there is no constitutional right to erect a structure. 917 F.2d at 347. The structure of a Chanukah menorah deserves no less protection than the structure of a newsstand. The building of

a newsstand is simply not a form of constitutionally protected expression. Thus *Lubavitch* is dispositive of Graff's request for an injunction. Requiring a permit for the structure is not a prior restraint on speech. While public forums certainly provide places where people have a right to express their views through handbills, literature and the spoken word, *Jamison v. Texas*, 318 U.S. 413, 416 (1943), they do not have the right to erect a newsstand, in this case on a public sidewalk. Without an ordinance and the permit it requires, newsstands and other structures have no protection from the city's bulldozer.

2.

Lubavtich involved a structure used to advance speech and religion. Graff nevertheless maintains that Supreme Court precedent entitles structures for newspaper distribution to constitutional protection. In *Lakewood* a newspaper challenged a city ordinance that allowed the mayor to grant or deny permits to publishers to place their newsracks on public property. The mayor had to state specific reasons if he denied the application; in granting a permit, the mayor could add such terms and conditions he deemed reasonable and necessary. The newspaper elected not to apply for a permit, instead bringing a facial challenge to the ordinance. 486 U.S. at 754.

> [A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. . . . The

> law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at 759. The Court (in a four to three decision) found that the First Amendment was implicated because the specific ordinance involved newspapers and required them to renew their newsrack licenses annually. The Court saw the printing and circulation of newspapers as "conduct commonly associated with expression" and the periodic licensing scheme as closer to a regulation that allows the government to view actual speech content before issuing a permit.

Graff argues that newsracks and newsstands should receive identical First Amendment protection. But *Lakewood* does not so easily bridge the gap between newsracks and newsstands. They are significantly different methods of distribution and we must assess them on standards uniquely suited to each. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems") (citations omitted).

Newsstands are large, permanent-type structures.[2] They are constructed, and once in place they are not

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[2] In *Lakewood* the newspaper publisher insisted that it was not seeking to rent or permanently build a structure on the sidewalk; the newsrack was characterized as similar to a newsboy, and the newsrack his "mechnical cousin." *Id.*, 486 U.S. at 778 n.6. This large, immobile and permanent newsstand is precisely what the publisher is *Lakewood* implied was unacceptable.

easily moved. Newsstands do not present one viewpoint; rather they supply many and varying editorial opinions. Newsstands shelter a business operator and his operation; they do not merely dispense or hand deliver newspapers.[3] Newsstands also are more likely to obstruct the views of pedestrians and automobile drivers. In short, newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space.[4] Thus, building and operating a newsstand is conduct, not speech, which the City can lawfully proscribe:

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[3] In *Lakewood*, 486 U.S. at 781-83, Justice White, in dissent, feared that equating newsracks with newsboys and conduct commonly associated with expression could allow newspaper publishers the right to take public property for private use. He concluded that such a comparison also ignored the governmental interests at stake: allowing all members of the public use of their streets and sidewalks, insuring the public's safety and aesthetic interests, especially where alternative methods of newspaper distribution are available. Although this argument was not successful as applied to newsracks, permanent newsstand structures present a much more imposing problem.

[4] We disagree with Judge Cummings that "size itself suggests nothing about whether the selling of newspapers and magazines from a stand is speech or conduct." Cummings, J. dissent at 54. Size is relevant, because at a certain size city's unfettered ability to regulate structures eclipses its limited ability to regulate speech. The dissent will concede that the city can place a "prior restraint" on the construction of a ten story building on public property, even if the building happens to have a newspaper store on the first floor. The same is true for a five story building or a one story building. We submit that the same is also true for a newsstand on public property even if it is not true for a newsrack on public property. Size matters, and a newsstand is more closely related to a building than it is to a newsrack.

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

Schneider v. State, 308 U.S. 147, 160-61 (1939); *accord Lee*, 112 S.Ct. at 2717 ("The principal purpose of streets *and sidewalks*, like airports, is to facilitate transportation, not public discourse." (emphasis added) (Kennedy, J., concurring)).

In *Lakewood* the Court concluded the ordinance implicated speech because it required periodic license renewal and the licensing system was "directed narrowly and

specifically at expression or conduct commonly associated with expression: the circulation of newspapers." 486 U.S. at 760. This case neither concerns simply the circulation and printing of newspapers nor conduct commonly associated with expression. This case involves a structure. A newsrack, as a source of news, is inextricably tied to the publication it contains. For instance, Chicago has newsracks for the Chicago Tribune, the Chicago Sun-Times, USA Today, the Wall Street Journal, and whatever other publications might be popular in the city. To give a city official unfettered discretion over newsracks is to raise the possibility that the official – because of dissatisfaction over a particular editorial policy – might ban or severely limit the newsracks of a particular publication. For instance, if the official is lampooned by, say, the Chicago Tribune, as he or his boss makes a re-election bid, he would have an incentive to limit their newsracks. At the very least, the Chicago Tribune might limit its editorial efforts because of fear of such censorship.

The same threat of prior restraint does not exist for newsstands. They are structures not at all tied to particular publications. In our hypothetical, the Chicago official – even if he wanted to – could not retaliate against the Chicago Tribune by regulating newsstands. Only under the least likely scenario would a Chicago official be able to target a certain publication by targeting a certain newsstand. For a city official to accomplish this type of censorship, he would need a large staff to check all of the newsstands in the city to find the ones disseminating the objectionable material. Then he would have to deny permits to those newsstands. To "chill" similar distribution by others, he would have to make public that he was

closing certain newsstands because they were distributing objectionable material. This scenario is hardly similar to one Chicago official nixing all of the newsracks of a certain publication by the stroke of his pen, while safely hidden behind the walls of city hall. So unlikely is the former scenario that the First Amendment does not require the ordinance to be drafted to avoid it. Further, the closing of newsstands would affect all of the publications in the newsstand equally, and the Chicago Tribune would still have its other methods of dissemination – newsboys, newsracks, in-building newsstands, etc. – to sell papers.

The protections provided newsracks are tailored to their peculiar characteristics. Judge Cummings' dissent and Judge Flaum's concurrence take the position that the same protections tailored to fit newsracks should be placed upon newsstands. But newsstands are not newsracks. The same threat of targeting one publication inherent in the regulation of newsracks is not present in the regulation of newsstands. Judge Cummings' dissent offers a remote scenario where a city official might target certain "off-beat publications" or "pornographic" publications by targeting certain newsstands. Cummings, J. dissent at 56-57. But the First Amendment does not require that we create unlikely scenarios for the censorship of speech and require city governments to draft their regulations to avoid these scenarios. Only when the ordinance at issue presents an obvious and immediate threat of censorship – as in the case of the newsrack ordinance in *Lakewood* – should we allow a facial challenge to head off the possibility of censorship. When the threat of censorship derives from the unlikeliest of scenarios – such as

targeting of "off-beat" or "pornographic" publications when issuing newsstand permits – a facial challenge is inappropriate. The threat is too remote and speculative.

Given that there is no constitutional right to build or maintain a newsstand on the public way, the district court properly refused to enjoin Chicago from removing Graff's newsstand. But Chicago is not interested in removing Graff's newsstand because it occupies public land. Rather Chicago wants to remove Graff's newsstand because he has no permit. Thus, the parties in this case did not focus their arguments on the propriety of whether the district court should have issued an injunction. They wanted a ruling on the constitutionality of the new ordinance. The district court obliged, and upheld the ordinance by granting Chicago's motions to dismiss. On appeal Graff claims the ordinance gives Chicago too much discretion, imposes unreasonable time, place and manner restrictions, does not provide sufficient judicial review, and denies equal protection by treating newsstands and sidewalk cafes differently. We will address each of these constitutional challenges.

B. The Commissioner's Limited Discretion

Graff argues that Chicago's newsstand ordinance violates the First Amendment by vesting too much discretion in the government official, here the commissioner of transportation. In *Lakewood* the Court struck down the City's ordinance because it vested too much discretion in the hands of a government official. 486 U.S. at 772. Graff argues that such a danger of viewpoint discrimination also exists in this case.

"[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757. A major premise in *Lakewood* was that "the Constitution requires that the City establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *Id.* at 760. The Court struck down the Lakewood ordinance specifically because there were "no explicit limits on the Mayor's discretion." *Id.* at 769. In denying a permit application, the mayor was required only to state "it is not in the public interest." Although the ordinance required the mayor to state his reasons, the Court found troubling the lack of specificity required and the limitless reasons the mayor could assert. *Id.* at 769-70. In granting a permit, the mayor could require the newsrack to be located "in an inaccessible location without providing any explanation whatsoever." *Id.* This constituted "unfettered discretion" abridging the First Amendment. *See FW/PBS*, 493 U.S. at 223; *Freeman*, 380 U.S. at 56 (party can "challenge a statute on the ground that it delegates overly broad licensing discretion"); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1939) (the offending statute subjected the defendant to "harsh and discriminatory enforcement by local prosecuting officials").

In this case the commissioner of transportation considers six exclusive criteria by which to grant or deny permission to build a newsstand:

> (1) Whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and

> existing land uses; (2) Whether the newspaper stand complies with this code; (3) Whether the applicant has previously operated a newspaper stand at that location; (4) The extent to which services that would be offered by the newspaper stand are already available in the area; (5) The number of daily publications proposed to be sold from the newspaper stand; and (6) The size of the stand relative to the number of days the stand will be open and operating.[5]

Chicago Mun. Code § 10-28-160(a). The ordinance also contains a number of technical considerations, such as application forms, *id.* at -150, size, and location regulations, *id.* at -170, and maintenance requirements, *id.* at -180. Graff specifically alleges that the commissioner should not be given discretion to remove a newsstand that "endangers public safety or property," that "interferes with or impedes the flow of pedestrian or vehicular traffic," or is placed "in such a manner as to impede or interfere with the reasonable use of [a display window]." *Id.* at -185(a) & (b).

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[5] Under the new ordinance, all existing newsstand permits expired on January 1, 1992. Chicago Mun. Code § 10-28-135. Although Graff has operated his newsstand since 1984, he has not operated under a permit. Presumably he must now compete for a permit on the same basis as any other person. As such, "when two or more otherwise equally qualified application are pending . . . preference shall be given to the application for the newspaper stand offering the largest number of different daily publications." *Id.* at -160(e). Once Graff is issued a permit under the new ordinance, the Commissioner's only consideration in not renewing it is whether the newspaper stand has complied with the code. *Id.* at -135(a) & -160(b).

By requiring the commissioner to consider these factors, his discretion is limited, not unbridled. The criteria give adequate and specific guidance to the commissioner as well as reasons for the applicant to anticipate the basis for granting or denying a particular permit to build a newsstand. If a permit to build a newsstand were denied, these express standards (and the commissioner's written reasons, *see id.* at -160(c)) give the plaintiff adequate guidance in challenging the application of the ordinance to his particular case, and upon judicial review allow an informed inquiry into whether the commissioner made his decision in an unconstitutional manner, such as by disfavoring certain speech.

Even though the ordinance allows the commissioner to use some discretion, *Lakewood* nevertheless required the law to have "a close enough nexus to expression, or to conduct commonly associated with expression, *to pose a real and substantial threat of the identified censorship risks.*" 486 U.S. at 759 (emphasis added). The criteria set out in Chicago's ordinance in no sense pose a "real or substantial threat" of censorship. *See Ward,* 491 U.S. at 794-95 (upholding as content-neutral regulations aimed at achieving the best musical volume and sound or appropriate sound quality in light of surrounding neighborhoods). *Jacobsen v. Crivaro,* 851 F.2d 1067, 1070 (8th Cir. 1988) (upholding as non-discretionary an ordinance restricting newsrack locations and sizes). The criteria give the commissioner proper authority to advance the city's desire to permit a given number of newsstands. At the same time they help avoid the threat of someone building a permanent newsstand of whatever size, design and location he chooses.

Graff still finds a problem with what he terms the commissioner's unbridled discretion in determining the number of permits to issue. But the ordinance caps the number of permits the commissioner may issue to the number of newsstands already located on Chicago's streets. Chicago Mun. Code § 10-28-130 ("No new permit for a newspaper stand shall be issued on or after the effective date of this ordinance"). As permits expire, or have been revoked, the commissioner may advertise that a permit is available. *Id.* at -130 & -135. Graff and others may compete for those the commissioner chooses to reissue. *Id.* at -160(e).[6]

True, the commissioner has discretion in determining how many permits to reissue. But that is "the business of government." *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 329 (7th Cir. 1991). Not all discretionary decisions implicate the First Amendment. *See City of Cincinnati*, 113 S.Ct. at 1517 (the City may limit the total number of newsracks for safety and aesthetic reasons). Since the limited discretion given to the commissioner in Chicago's ordinance does not in any way limit the speech content of the newsstand operator, there is no threat or risk of censorship which violates the First Amendment.

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[6] In a footnote in his reply brief, Graff argues for the first time that the current restrictions on the number of permits issued is a codification of arbitrary practices under the old ordinance. This argument is waived. Fed. R. App. P. 28(f) ("A reply brief shall be limited to matter in reply."). The parties also have not addressed the extent to which having a permit under the old ordinance affects the locations of future newsstands. These issues are not properly before us on appeal.

C. Reasonable Time, Place and Manner Restrictions

If the government seeks to control speech without reference to viewpoint, ordinances can contain reasonable time, place and manner restrictions. These restrictions, however, must serve significant government interests (narrowly tailored) and leave alternative avenues to communicate the same information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); *Clark*, 468 U.S. at 293. If, however, the ordinance discriminates on the basis of viewpoint, such as allowing only communication of particular political or religious messages, the government would face a near insurmountable burden. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1516 (1993) (noting that prohibiting the use of sound trucks because of noise must apply equally to "music, political speech, and advertising."). Graff alleges that the ordinance controls speech content in several ways. Because the ordinance permits the newsstand to carry only newspapers, periodicals and similar publications, and favors the applicant who will carry the most daily publications, he claims it eliminates vendors who carry other expressive materials. He also complains that the newsstands' size limitation magnifies these impermissible restrictions. Chicago does not dispute these characteristics; rather it argues that they are necessary and reasonable time, place and manner restrictions.

This case resembles *City of Renton*, 475 U.S. 41. There the City of Renton, Washington, enacted a zoning ordinance to prohibit adult motion picture theaters from locating within a certain distance from residential,

church, or school property. *Id.* at 43. The Supreme Court determined that the ordinance

> does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the district court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community.

Id. at 47. The Court analyzed the ordinance by looking at the time, place and manner restrictions in the regulation. The Court held that the ordinance was justified without reference to content, was thus "content-neutral," *id.* at 48, and served a substantial government interest while allowing for reasonable alternatives of communication. *Id.* at 53. Surely if a city can restrict speech through the planning, regulation, and zoning of property because of the secondary effects of adult motion pictures on the neighborhood, *id.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976), Chicago should be allowed to regulate property on which newsstands could be located. *Accord Cornelius*, 473 U.S. at 799-800 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."). Here the time, place and manner restrictions are entirely reasonable.

Graff asserts that there is no showing that accommodating multiple uses of the public way and public safety requires an arbitrary size limitation on newsstands. The ordinance requires that the newsstand not occupy more than one-hundred and twenty square feet nor stand more than nine feet in height. Chicago Mun. Code § 10-28-170. In addition, the newsstand must always allow pedestrians at least six feet of clear passage, and cannot be located within three feet of a property line. *Id.* at -185(b). This is "the business of government." *Chicago Observer,* 929 F.2d at 329. We are not in a position to second-guess the city council's concerns. In any event, these restrictions are eminently reasonable. Pedestrians certainly should have access to enough space to walk on the sidewalks. Where structures block part of the sidewalk, pedestrians also have an interest in how far they must walk to get around them. In addition to being reasonable, these restrictions are content-neutral and do not constitute a prior restraint.[7]

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[7] *See Chicago Observer,* 929 F.2d at 328; *Jacobsen,* 851 F.2d at 1070; *International Caucus of Labor Comm. v. City of Chicago,* 816 F.2d 337, 340 (7th Cir. 1987) (upholding restrictions on physical props used to spread message based on the size of the property and public safety); *see also Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 707 (1986) ("the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books"); *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 644 n.4 (1981) (noting that there was no First Amendment violation when several hundred potential exhibitors were prevented from speaking because of the cap on booths and a "first come – first serve" policy).

Chicago readily admits that the "intended function" of the ordinance "is merely a preference for newsstands that maximize the number of newspapers sold." Apparently Graff wants to carry more than newspapers, periodicals and similar publications. He asserts that the ordinance is content-based because it does not allow newsstands to sell books or videotapes, relying on *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991).[8] There the district court held unconstitutional an ordinance that completely prohibited the distribution of commercial handbills on public property. The city had asserted its interests in safety and aesthetics, although it allowed newsracks to carry all other publications. The court of appeals concluded that the ordinance was an impermissible content-based restriction. 946 F.2d at 472, *aff'd*, 113 S.Ct. at 1516. In distinguishing *City of Renton*, the Sixth Circuit stated: "Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets, . . . the ordinance may have been constitutional under the secondary effects doctrine." *Discovery Network*, 946 F.2d at 472 n.12. In affirming, the Supreme Court also noted that in contrast to *City of Renton* there were no distinguishing secondary effects attributable to newsracks containing commercial publications as compared to newsracks containing newspapers that would justify differing treatment. *City of Cincinnati*, 113 S.Ct. at

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[8] *Discovery Network*, 946 F.2d 464, was affirmed after the parties had completed briefing and while the appeal was pending. *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993).

1517. Chicago, following this reasoning, notes that newspapers do not represent any favored viewpoints not represented in books or videotapes. The restrictions are "simply an effort to reduce clutter on the public way, . . . and facilitate the distribution of newspapers from a newsstand without undue obstruction of the public ways."

Certainly a city can regulate newsstands to reduce clutter on its streets. *See Taxpayers for Vincent*, 466 U.S. at 805. But Chicago has advanced no argument that books and videotapes clutter the streets any more than do newspapers. The assertion that newsstands themselves clutter the streets merely restates the issue. Chicago more convincingly argues that books and videotape sales would obstruct the flow of pedestrians. The City can recognize that people impulsively or routinely purchase newspapers in seconds. The more time-consuming purchase of books or videotapes, in contrast, would cause congregation and impede the flow of others who would then have to walk around not only the newsstand structure but the audience it attracted. *See Heffron*, 452 U.S. 640. Also, browsers would block access to those who wanted to make a quick purchase of a newspaper. *See Gannett Satellite Info. Net. v. Metro Transp. A.*, 745 F.2d 767, 773-4 (2d Cir. 1984) (upholding as content neutral a regulation which allowed newspapers but not other vendors to install coin operated vending machines; "the newspapers are in a privileged position and are not and will not become the victims of discrimination").

That the ordinance considers how many publications the newsstand will carry does not infringe, but rather promotes First Amendment interests. The ordinance

clearly favors an applicant who has the higher, not the lower, proposed number of publications to be sold from the newsstand. This conceivably "censors" only the newsstand operator who himself might eliminate certain publications from distribution. In addition, an ordinance directed at the number of publications concerns quantity, not quality or content. Graff cites no case where an ordinance promoting more speech (in general) infringes the First Amendment.

Graff asserts that promoting the dailies serves to advance a message less controversial to the greatest number of people. This ignores the reality of the marketplace. The dailies succeed only because they sell to the greatest number of people, notwithstanding the government's perceived agreement with any particular viewpoint. Any notion that Chicago is promoting the dailies because based on past experience it is likely to agree with their future viewpoints is mitigated by the ordinance favoring the newsstand operator who sells the most dailies – an obvious attempt at variety, not indoctrination. Chicago argued in the district court that the Supreme Court has encouraged the promotion of daily publications over the sale of other "expressive materials." As stated in *Lakewood*, 486 U.S. at 771, "News is not fungible. Some stories may be particularly well covered by certain publications, providing that newspaper with a unique opportunity to develop readership. In order to benefit from that event, a paper needs public access at a particular time; eventual access would come too little and too late." The manner in which this ordinance regulates the newsstand operation allows that necessary access.

Graff finally argues that the time, place and manner restrictions are not narrowly tailored to serve the asserted governmental interests. *See Ward*, 491 U.S. at 796; *City of Los Angeles v. Preferred*, 476 U.S. 488 (1986). Specifically, Graff argues the ordinance sets an arbitrary cap on the number of permits and that given the provision requiring minimum clearance around the newsstand, there is no reason for the arbitrary size limitation. He wants further discovery to show there are less restrictive alternatives.

The "requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (citations omitted). This test is not as heightened as Graff would have us believe.

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Id. at 800. Because Chicago has the ability to ban all newsstands, providing for some by a comprehensive permit scheme serves the people of Chicago well. The ordinance accommodates competing interests where pedestrians wish room to walk, several newsstand operators desire the same location, and tourists wish to take a picture of a famous landmark without a newsstand front and center. Without the permit ordinance, Chicago's interests would not only be achieved with less effectiveness, but would fail. The restrictions also leave open

alternative channels for communication of the information. *Id.* at 802. Chicago not only "teems with ads and with publications," *Chicago Observer*, 929 F.2d at 328, one can easily discern that the public has no problem picking up a newspaper, book or videotape, be it in stores that actually own their own property or from newsboys yelling out the headlines.

For the foregoing reasons, we conclude that the time, place and manner restrictions contained in the new ordinance are reasonable, are justified without reference to specific content, and are narrowly tailored to serve significant interests of the people of Chicago. Alternative channels are also available to communicate any speech otherwise restricted.

D. The Propriety of Dismissal Versus Summary Judgment

The district court dismissed two counts of the complaint based in part on the reasonableness of the ordinance's time, place and manner restrictions. Graff argues that the pleading stage is no place for such an inquiry, especially because the government has the burden on this issue. *See Preferred*, 476 U.S. at 496; *accord Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating state procedure because it placed the burden on the individual to show the restriction on speech was unjustified). No doubt the norm is to wait until the summary judgment stage of the litigation to address the ultimate question of whether the ordinance should stand. *FW/PBS*, 493 U.S. at 221; *Renton*, 475 U.S. at 45; *Vincent*, 466 U.S. at 793; *Young*, 427 U.S. at 55. And Chicago does not dispute that it bears the burden

on these issues. Contrary to Graff's assertions, however, in this case the district court was correct in resolving this matter.

In *International Caucus of Labor Committees v. City of Chicago*, 816 F.2d 337, 339 (7th Cir. 1987), the district court dismissed a facial attack on an ordinance that prohibited persons from setting up tables, hanging signs and storing literature at O'Hare International Airport. We had previously upheld parts of a similar ordinance in *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263 (7th Cir. 1978). The court, quoting from Supreme Court precedent, gave credence to the government's case at the pleading stage:

> A state's interests in protecting the safety and convenience of persons using the public forum is a valid governmental objective. The characteristic nature and function of the forum must be considered in assessing the constitutionality of the regulation. . . . As held in *Rochford*, the City has valid concerns about expediting the processing of travelers, maintaining the free and orderly flow of traffic, and avoiding the disruption of normal airport activities. Prohibitions on the use of banners or signs that exceed the body width and on the storing of materials, except in a carry bag that must be carried or harnessed, are reasonably related to the City's legitimate interests.

International Caucus, 816 F.2d at 339-40 (citations and quotations omitted). As we have seen, Chicago asserted that many of these interests apply in this case as well. In *International Caucus*, we concluded that even in the First Amendment context, the plaintiff is not excused "from

the requirement that the facts as alleged must state a cause of action." *Id.* at 340.

In *Rothner v. City of Chicago*, 929 F.2d 297 (7th Cir. 1991), we also affirmed the district court's dismissal of a facial challenge to a city ordinance. Chicago had prohibited minors from playing video games while school was in session. With the caveat that "courts should proceed cautiously when asked to dismiss on the basis of the pleadings," *id.* at 302, we concluded that the purpose of the ordinance, to encourage students to complete high school and discourage truancy, was unrelated to speech content. Also, the ordinance was narrowly tailored to serve an important governmental interest, namely "insuring that children receive an adequate education." *Id.* at 303. And alternative channels of communication were open – the children were free to play the video games on their own time. There, we concluded that the First Amendment did not require us to "try the statute" beyond the pleading stage. *Id.* at 304 (citations omitted).

From *Preferred, International Caucus* and *Rothner* we gather several important principles. Courts should not merely assume that an ordinance advances the state's interests. *Preferred*, 476 U.S. at 496. In *Preferred* the Court remanded to the district court because it needed to "know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." *Id.* at 495. In this case, however, no one is questioning the present uses of newspapers or sidewalks on the streets of Chicago. How Graff proposes to use his newsstand we accept as true from his complaint. *See City of Renton*, 475 U.S. at 53

(City does not have to conduct studies or produce independent evidence on issues that are well developed here or elsewhere). Where the courts have already upheld a similar ordinance because of the governmental interests at stake, a future litigant should not be able to challenge similar governmental interests without showing some distinction at the pleading stage. *E.g., International Caucus,* 816 F.2d at 340.

In this case there are no disputed issues of material fact that we need to resolve. Nor are the interests that Chicago raises in this case unique or different. It has not relied on independent research studies or findings. Rather, Chicago has relied on a common sense approach and the desire to best allocate public property within the spirit of the First Amendment. As discussed in Part C, we conclude that as a matter of law Chicago can reasonably restrict newsstands to selling daily newspapers. Thus, the district court properly dismissed at the pleading stage Graff's arguments that the ordinance should allow him to operate a larger newsstand in which to sell books, videotapes and other methods of expression.

E. The Adequacy of Procedural Safeguards

Graff asserts that the ordinance is completely devoid of safeguards for review of the commissioner's decision. Chicago responds that state law provides for judicial review, which in itself is sufficient. Primarily, the First Amendment protects speech by prohibiting the government from engaging in censorship. But even if an ordinance properly limits an administrator's discretion, theoretically the government could still act improperly

where its decision is not subject to review. The question is whether sufficient procedural safeguards exist to "obviate the dangers of censorship system." *Southeastern Promotions*, 420 U.S. at 559, In *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965), the Court set out certain "safeguards," later summarized by Justice Brennan as follows:

> (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor must bear both the burden of going to court and the burden of proof in court.

FW/PBS, 493 U.S. at 239.[9] Of concern to Graff, since he has no permit, are the procedures Chicago follows in removing a newsstand without a permit. Once the commissioner discovers a newsstand operating on public

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[9] In *FW/PBS* a plurality (O'Connor, Stevens and Kennedy, JJ.) found that "the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228. Justices White and Scalia and Chief Justice Rehnquist did not apply any of the "safeguards." And Justices Brennan, Marshall and Blackmun would have applied all three. The Court considered the nature of the speech and the discretion in the ordinance when determining to what extent the *Freedman* safeguards were necessary. Thus, if the full procedural protections of *Freedman* are not necessary in the context of sexually oriented licensing schemes, *FW/PBS*, 493 U.S. at 228, it is an open question whether they are necessary in an ordinance that regulates the building of newsstands on public property.

property without a valid permit, the commissioner has the authority to give the operator fifteen days after the posting of a removal notice to restore the public property to its original condition. Chicago Mun. Code § 10-28-190(c). Within that time the owner or operator may request a hearing before the commissioner of transportation, which will be scheduled within thirty days. Even if the commissioner were to rule unfavorably, the operator would not have to remove his newsstand until fifteen days after the commissioner's final decision. Whether a newsstand is ordered removed, or a permit is granted, denied or renewed, the ordinance leaves these final determinations solely in the hands of the commissioner of transportation. But there is much opportunity for input and discussion before that final determination is made.[10]

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[10] In this case Chicago utilizes the usual procedure in ruling on a permit application – set up more than one level of inquiry and get as many people involved in the process as possible; public hearings, of course, are necessary, at least politically. To begin the process, the commissioner of transportation advertises the availability of newsstand permits (in a newspaper, of course) and shortly thereafter accepts applications. Chicago Mun. Code § 10-28-135. Copies are soon distributed to the commissioner of planning and development and the alderman of the ward affected. The appropriate city council committee is also involved in holding public hearings on the permit. All interested persons, including the applicant, are given an opportunity to speak. The city council committee submits its recommendation to the commissioner of planning and development. He then submits a report to the commissioner of transportation, who gives the previous recommendations "due consideration," and acts on it within thirty days of that receipt. *Id.* at 160(a). All are bound by the six enumerated considerations, listed *supra.* The total time from application to decision can be no less than

Graff argues that the ordinance does not provide for "expeditious judicial review" of the commissioner's decision. *See FW/PBS*, 493 U.S. at 239.[11] The ordinance contains no mention of the role of the judiciary in reviewing the commissioner's decisions. As an initial matter, it is not clear why the Court in *Freedman* set out the apparent requirement that an ordinance such as this explicitly provide [sic] for prompt judicial review. A person always has a judicial forum when his speech is allegedly infringed. Neither Graff nor the City argues that the judiciary cannot hear challenges to this ordinance simply because it does not have a specific provision designating a review process. The lack of these additional procedural safeguards does not in any way increase the threat of speech

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thirty-five and no more than sixty-five days. If the application is denied, the applicant can request a hearing before the commissioner of transportation which must be held within the next thirty days (a quasi-motion for reconsideration). *Id.* at 160(c).

[11] In *FW/PBS*the Court held that the city of Dallas need not bear the burden of going to court nor the burden of proof once in court for two reasons: The ordinance was not presumptively invalid because the decisionmaker did not pass "judgment on the content of any protected speech." Also, "[b]ecause the license [or in this case, a permit] is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through the court." 493 U.S. at 229-30. These same reasons apply in this case. We have already held that the ordinance does not give the commissioner unfettered discretion and that any content restrictions are reasonable. Graff's newsstand is also as much a business as an adult book store. Therefore, Chicago need not prove its case in court before ruling on a permit application or removing a newsstand.

censorship. The "safeguards" or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions. But we are not writing on a clean slate.

The Constitution of the State of Illinois, Article 7, Section 6 (1970), delineates the explicit powers of home rule units (which the parties do not dispute includes Chicago). *See City of Chicago v. State & Mun. Teamsters,* 468 N.E.2d 1268, 1272 (Ill. App. 1984). "A home rule unit may exercise any power and perform any function pertaining to its government and affairs." Ill. Const. art. 7 § 6(a). The Supreme Court of Illinois took little time in holding that this power does not include providing for judicial review of administrative agency decisions. *Paper Supply Co. v. City of Chicago,* 317 N.E.2d 3, 16-17 (Ill. 1974); *Cummings v. Daley,* 317 N.E.2d 22, 23 (Ill. 1974). In each of those cases the Supreme Court of Illinois rejected a home rule municipality's attempts to determine "both the jurisdiction of the circuit court to review its municipal administrative determinations and the procedure to be followed in seeking judicial review of those determinations." *Nowicki v. Evanston Fair Housing Review Bd.,* 338 N.E.2d 186, 187 (Ill. 1975); *See Quinlan & Tyson, Inc. v. City of Evanston,* 324 N.E.2d 65 (Ill. App. 1975). Just because Chicago lacks the separate authority to make available "expeditious judicial review," *FW/PBS,* 493 U.S. at 239, does not mean that such review does not exist.

The appropriate method to review Chicago's administrative agency decisions is by the common law writ of *certiorari. Holstein v. City of Chicago,* 803 F.Supp. 205, 210 (N.D.Ill. 1992); *Stratton v. Wenona Comm'n Unit Dist. No. 1,* 551 N.E.2d 640, 645 (Ill. App. 1990); *Norton v. Nicholson,*

543 N.E.2d 1053, 1059 (Ill. App. 1989). Unless excused, claimants have six months to file, wherein review "is extremely broad in scope, and extends to all questions of fact and law contained in the record before the court, including *de novo* review of any constitutional issues." *Holstein*, 803 F.Supp. at 210, *citing Howard v. Lawton*, 175 N.E.2d 556, 557 (Ill. 1961).

> [T]he court determines from the record alone whether there is any evidence fairly tending to support the order reviewed, and the court cannot set aside the order unless it is contrary to the manifest weight of the evidence. . . . [F]indings and conclusions on questions of fact are *prima facie* true and correct. It is not the court's function to resolve conflicting evidence.

Norton, 543 N.E.2d at 1059. "If the circuit court, on the return of the writ, finds from the record that the inferior tribunal proceeded according to law, the writ is quashed; however, if the proceedings are not in compliance with the law, the judgment and proceedings shown by the return will be quashed." *Stratton*, 551 N.E.2d at 645.[12]

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[12] The case of *Smith v. Department of Public Aid*, 367 N.E.2d 1286 (Ill. 1977), helps illustrate the importance of the common law writ of *certiorari* in the constitutional context. In *Smith* a county public aid department increased the purchase price for food stamps. A state department of public aid affirmed that decision. On writ of *certiorari* the trial court declared certain state and federal statutes unconstitutional. In particular, the trial court found that the Illinois Public Aid Code, Ill.Rev.Stat.1975, ch. 23 par. 11-8.7, and a portion of the federal food stamp program, 7 U.S.C. § 2022 (1970), deprived the plaintiffs of due process and equal protection under the Illinois Constitution and the Fifth and Fourteenth Amendments to the

In some other first Amendment cases the Supreme Court seemed to require an ordinance to provide for judicial review, even when the writ of common law *certiorari* was available. However, the Court has not been presented directly with the argument that *certiorari* was in itself sufficient review, especially where a state makes the common law writ the current common practice, and in fact forbids any other kind of review. We conclude that such review is sufficient. Illinois has shown that a judicial forum is available to review administrative agency decisions. The state maintains uniform judicial review procedures by forbidding home rule units such as Chicago from commenting on the matter. As such the state can expect such uniform procedures to expedite cases and better serve the interest of Graff in a case such as this one.

F. Equal Protection

In count two, Graff alleges that newsstands are treated differently than other permitted uses of the public way, such as sidewalk cafes. One would hope so. Differences are obvious. Each use requires a permit, but separate ordinances necessarily provide difference criteria for issuing them. Where, as here, the newsstand ordinance passes strict scrutiny under the First Amendment, it most certainly will pass the rational basis test under equal protection analysis.

United States Constitution, because they did not provide for sufficient judicial review. 367 N.E.2d at 1292. The Supreme Court of Illinois reversed, holding that the common law writ of *certiorari* provided sufficient oversight. *Id.* at 1293.

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Federal Commun. Comm. v. Beach Commun., Inc., ___ U.S. ___, 1993 WL 179242 at 4 (June 1, 1993). We have already explained why the ordinance infringes no fundamental First Amendment right.[13] If reasonable time, place and

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[13] Graff alleged in his amended complaint and in the facts section of his brief on appeal that then and now newsstands have operated on the public way without permits and only Graff has been targeted for eviction. Why was this not pursued in response to Chicago's motion to dismiss? If Chicago was allowing newsstands without permits, surely it could not seriously argue that it could remove a newsstand that had not secured one. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 n.6 (1984). Obviously there would be no need for the district court to rule on the constitutionality of an ordinance on its face when it was being applied in such a random fashion. Indeed, the record shows that Graff received notices to remove his newsstand which for whatever reasons were later rescinded. Graff, however, raised the equal protection analysis only in arguing that Chicago discriminated by its treatment of newsstands as compared to other, non-expressive uses of the public way. He did not explicitly or implicitly argue any disparity in requiring newsstand permits to the district court, or on appeal; thus, the issue is waived. *Brookins v. Kolb*, 990 F.2d 308, 316 (7th Cir. 1993); *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 853 (7th Cir. 1981). We have proceeded in this case on the assumption that Chicago evenhandedly enforces its ordinances.

manner restrictions outweigh Graff's right to free speech, they certainly are sufficient to pass as "conceivable" and "rational."

Graff argues that Chicago taxes newsstands but not other uses of the public way. Chicago responds that Graff waived the argument because in the district court he questioned only the propriety of a newsstand fee as an invalid prior restraint under the First Amendment, an issue he has not raised on appeal. Graff also argues that newsstands and sidewalk cafes are treated differently with respect to landmark commission approval. Chicago disputes this. It argues Chicago Municipal Code section 2-120-740 subjects all structures on public property to equal treatment. In fact, it argues that section 4-384-060 gives the City even more discretion in refusing to grant a cafe permit (as compared to refusing a newsstand permit).

These distinctions do not really matter. Varying taxes and different permit requirements for obviously different uses do not merit word-by-word scrutiny by judges who might prefer to tax and regulate some other way. The question is whether the different treatment of newsstands and cafes occupying the public sidewalks are for "conceivable" and "rational" reasons. We can conceive of many rational reasons for the differences,[14] not the least

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[14] Chicago could reasonably feel that newsstands impede the flow of pedestrian traffic more so than sidewalk cafes. Cafes involve a restaurant that seeks to extend its eating facility to the fresh air. It is reasonable for Chicago to believe that newsstands will not ordinarily attach to nearby buildings. They are free standing on the sidewalk, thus requiring size limitations so as to

of which one serves food (a highly regulated enterprise) and the other does not. The only real similarity is that they occupy the sidewalk. It would arguably be irrational to treat these completely different purposes the same way. In fact, equal treatment with a sidewalk cafe would probably result in much more burdensome limitations for a newsstand anyway. Chicago has a very rational basis for mandating different permit requirements for these very different uses.

IV. Conclusion

Graff does not have a constitutional right to build a newsstand on public property. This case involves a

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accommodate adjacent structures. For pedestrians wishing to determine whether it is safe to cross the street, or for drivers wishing to avoid hitting pedestrians, cafes pose less serious threats to safety. It is not only conceivable, but probably a certainty, that many cafes are located in front of property already in use as a restaurant. Extending that type of business on to part of the sidewalk would compromise landmark property no more than the restaurant operating there in the first place. Newsstands, by contrast, stick out; Chicago could feel that such structures are not as aesthetically pleasing. They are separate entities usually having nothing to do with adjoining property. Chicago should be given deference in asserting that lack of patrons would run unattractive cafes out of business, giving them ample incentive to maintain aesthetically pleasing premises. Persons merely wanting a newspaper probably do not regard the beauty of the newsstand of any consequence. Cafes require sufficient space to accommodate sitting customers and tables for food. Newsstands, in contrast, differ radically in the amount of space necessary, and employ fewer people. Eating establishments are heavily regulated and taxed in their own right.

structure which in itself has no First Amendment protection. Thus, the district court properly refused to enter a preliminary injunction, notwithstanding the validity of a permit ordinance. Even if newsstands involve speech, Chicago's new ordinance passes muster. The ordinance does not allow for content based discrimination by giving the commissioner of transportation too much discretion in ruling on a permit. To the extent that the ordinance restricts speech, Chicago has articulated reasonable time, place and manner restrictions to justify any infringement. The ordinance is also subject to adequate procedural safeguards; therefore the district court was correct in dismissing count one. Because the ordinance is constitutional under Equal Protection analysis, the court was correct in dismissing count two.

The district court is AFFIRMED.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, concurring. I concur in the judgment of the majority but write separately to emphasize my belief that the erection and maintenance of newspaper stands qualifies as "conduct commonly associated with expressions." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988). Accordingly, Chicago's licensing ordinance (hereinafter "the Ordinance") implicates the First Amendment's protection of expression, *see id.* at 769, and a facial challenge against it lies if the Ordinance carries with it significant risks of self-censorship and of post-decision difficulty in detecting whether censorship motives clandestinely prompted license denials, *see id.* at 759. Because Chicago's scheme at the outset establishes a discretionary system to govern the issuance of permits, the specter of these risks looms and a facial review of the ordinance is in order. Scrutiny of the Ordinance's provisions, however, reveals that the danger of content-based censorship presented by such licensing schemes is in this case sufficiently mitigated to allow the Ordinance to survive facial attack. In addition, I do not feel that the Ordinance is the kind of scheme for which the lack of a special provision for prompt judicial review is fatal.[1]

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[1] I do not think it is necessary for the majority to reach the question of whether or not there is an independent constitutional right to erect newsstands on public property. Because Chicago did not enact an absolute ban on newsstands and the majority today finds that capping permits at their historical level is a reasonable restriction, passing on this question is not necessary for the resolution of this case. Comment on nonexistence of such a right may be tempting but is probably unadvised as the issue is by no means settled. *Compare Providence Journal Co. v. City of Newport*, 665 F. Supp. 107, 112 (D.R.I. 1987) (intimat-

I.

I respectfully suggest that the majority misses the mark in asserting that "[t]his case neither concerns simply the circulation and printing of newspapers nor conduct commonly associated with expression." *Ante*, at 12. Like newsracks, newsstands are in the business of circulating expressive materials. *See City of Lakewood*, 486 U.S. at 768. That they do so on a larger scale, with greater variety[2] and take up more physical space in performing

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ing that a total prohibition of newsracks, newsstands and newsboys may be unconstitutional), *and City of Lakewood*, 486 U.S. at 762 n.7 (declining to pass on whether a city may constitutionally prohibit the placement of newsracks on public property), *with id.* at 780-81 (White, J., dissenting) (stating that there is no First Amendment right to erect newsracks on city streets) *and City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1525 (1993) (Rehnquist, C.J., dissenting) (same).

[2] The majority seems to suggest that because newsstands facilitate the distribution of many different publications they are somehow *less* associated with expression than newsracks which typically only offer for sale a single publication. *See ante*, at 12-13. The majority apparently believes this follows from the fact that shutting down whole newsstands because of displeasure with one publication is a more awkward and less effective means of censoring that publication than targeting its individual newsracks directly. While this observation may buttress an eventual conclusion that Chicago's mechanism for licensing newsstands passes constitutional muster to conclude that this single characteristic renders the maintenance of newsstands any less conduct intimately tied to expression is fallacious. The result from such a logical leap and its concomitant hasty dismissal of the constitutional dimensions of this case is a failure to consider the full breadth of First Amendment risks occasioned by discretionary control over newsstands. Admittedly, the licensing of newsstands is a clumsy way to censor the Chicago Tribune, but it has the potential to be a honed weapon in a war

their distributive function does not alter the fundamental fact that maintaining a newsstand, just like maintaining a newsrack, is an activity peculiarly linked to expression. In that respect a newsstand is not like a candy machine or a hot dog stand or any other mere "structure." *See id.* at 760-61. A newsstand is an instrument for the dissemination of expressive materials, and as such it falls within that special category of activities whose regulation implicates First Amendment values.

Since this licensing scheme is "directed narrowly and specifically at . . . conduct commonly associated with expression," *id.* at 760, a facial challenge is an appropriate means to test for constitutional infirmity when by its nature the scheme does not foreclose the "identifiable risks to free expression," *id.* at 757, that a system of prior restraint engenders and that can be "effecively alleviated only through a facial challenge." *Id.* Now the Ordinance does not fit the traditional mold of a prior restraint since it does not directly regulate speech *qua* speech. *See, e.g., Southeaster Promotions, Ltd. v. Conrad,* 420 U.S. 546, 552 (1975) (city preventing performance of rock musical "Hair"); *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-52 (1969) (city requiring permit to conduct a parade); *Freedman v. Maryland,* 380 U.S. 51, 57 (1965) (movie censorship system); *Near v. Minnesota,* 283 U.S. 697, 713-17 (1931)

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against the lone operator who insists on including controversial or unpopular publications in his selection. Judge Cummings' dissent succeeds in putting its finger on the panoply of hardly fanciful dangers to free expression that can be the bedfellows of the regulation of even mere newsstands. *See post,* at 56-57. These potential dangers must be acknowledged before turning to address the procedural adequacy of Chicago's licensing system.

(newspaper censorship). Rather, it is one aspect of Chicago's effort to keep within reasonable bounds businesses' usage of the public ways. *See* Chicago Mun. Code § 4-384-060 (establishing discretionary licensing of sidewalk cafes based on considerations of pedestrian flow, building access, safety and aesthetics). But by targeting for licensing a business inextricably connected to the exercise of First Amendment freedoms, Chicago's scheme raises the possibility of those identifiable risks that we commonly associate with prior restraints.

Firstly, just as the licensure of newsracks can chill a newspaper's zest to pursue issues and opinions displeasing to the licensor, *see City of Lakewood*, 486 U.S. at 757-58, licensure of newsstands has the potential to prompt vendors to spurn publications offensive to the licensor's (or his constituents') sensibilities and politics. Only a facial challenge adequately addresses such a risk. Secondly, discretionary licensing schemes frequently provide fertile ground for "*post hoc* rationalizations by the licensing official . . . , making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id.* at 758. In an "as applied" challenge, an unsuccessful applicant for a discretionary newsstand permit would face the same kind of struggle in demonstrating that his rejection was motivated by which publications he sells as a disappointed newspaper would in showing it lost its newsrack because of what it writes. The Ordinance sets out what is basically a discretionary system of licensing, the sort of system in which such risks can lurk, and appellants have alleged that under it city officials "enjoy unfettered discretion to deny . . . permits altogether."

Ward v. Rock Against Racism, 109 S. Ct. 2746, 2755 (1989). "Thus, waiting for an alleged abuse before considering . . . a challenge would achieve nothing except . . . to risk censorship of free expression during the interim." *Id.* at 770 n.11. Therefore, I feel it is appropriate to examine under the lens of a facial challenge whether the Ordinance is characterized by standards and other features adequate to rein in the exercise of discretion and minimize the risk of content discrimination. *See Freedman*, 380 U.S. at 56-57 ("Although we have no occasion to decide whether the vice of overbroadness infects the . . . statute, we think that appellant's assertion of a similar danger in the . . . apparatus of censorship – one always fraught with danger and viewed with suspicion – gives him standing to make that challenge.").

II.

Turning to the details of the Ordinance, none of the six factors upon which the Commissioner of Public Works' permit decisions are based facially vest him with unbridled discretion in accepting and rejecting applicants.[3] Thus, the Ordinance does not grant to city officials

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[3] The Commissioner of Public Works (CPW) in his ultimate decision (as well as the Commissioner of Planning when making his recommendation to the CPW and the City Council, if making a recommendation to the CPW) can only consider:

(1) whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;

the sort of standardless carte blanche that the Supreme Court has unfailingly condemned. *See, e.g., Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), *Freedman v. Maryland,* 380 U.S. 51 (1965), *Thornhill v. Alabama,* 310 U.S. 88 (1940). I do recognize that some of the enumerated factors, as well as having a scheme where six are weighed in combination, allow a measure of flex. We must remember, however, that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward,* 109 S.Ct. at 2755, and these are after all the kinds of legitimate concerns one would expect a city to weigh when deciding how to allocate limited public space in a neutral way. Moreover, these criteria provide definite and finite guidelines against which the Commissioner's written reasons for a denial, *see* Chicago Mun. Code § 10-28-160(c), can be measured and comparisons made from case to case – a safeguard that the standardless system in *Lakewood* lacked. *See Lakewood,* 486 U.S. at 771.

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(2) whether the newspaper stand complies with this Code;
(3) whether the applicant has previously operated a newspaper stand at that location;
(4) the extent to which services that would be offered by the newspaper stand are already available in the area;
(5) the number of daily publications proposed to be sold from the newspaper stand; and
(6) the size of the stand relative to the number of days the stand will be open and operating.

Chicago Mun. Code § 10-28-160(a).

In spite of the presence of these exclusive factors, their residual malleability may still have proven unacceptable had the ordinance been written to apply them to permit renewal and not just the initial decision to issue. The fact that the full range of discretionary criteria does not apply to renewal – renewals are automatic so long as existing newsstands are in compliance with the City Code, *see* Chicago Mun. Code 10-28-160(b) – indicates to me that the Ordinance neither was intended to promote nor in fact dangerously facilitates content discrimination in the licensing of newsstands. One of the distressing features of the newsrack ordinance in *Lakewood* was the need to annually reapply for licenses. This periodic requirement enabled the licensor to routinely discipline newspapers for speech already uttered. *See Lakewood*, 486 U.S. at 759-60. In the context of newsstands such a system would allow the licensor to monitor the type of publications offered for sale, effectively presenting the more "direct . . . threat to speech [of] allowing a licensor to view the actual content of the speech to be licensed." *Id.* at 760. Then, under the cloak of discretionary decision making, the licensor could easily reject a renewal application because he disapproves of what the stand sells. Chicago's *pro forma* renewal process, by contrast, does not afford that kind of opportunity for ongoing censorship. On application for renewal, the discrete question of compliance with the Code replaces the discretion of the initial permit decision. Furthermore, first time applicants, who are subject to the full discretionary process, do not provide in their application a list of publications that they intend to sell. Therefore, overall, Chicago's mechanism

offers few routes by which content motives can obliquely infiltrate the permit process.

III.

Seemingly the most difficult feature of the Ordinance, in light of Supreme Court precedent, is the absence of any provision for expeditious judicial review of the Commissioner's decision. However, I believe that because the Ordinance does not involve separating protected from unprotected speech and by its own terms presents little risk of facilitating content discrimination, it can survive constitutional attack despite the lack of a self-contained provision for prompt judicial review.

A.

Since the Supreme Court's decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), it has become accepted practice to examine licensing schemes that regulate speech related activities for the presence of three procedural safeguards: 1) the administrative decision allowing or forbidding the speech must be forthcoming within a short and fixed time; 2) prompt judicial review of a license denial must be available; and 3) the licensor must bear both the burden of going to court and the burden of proof in court. *See id.* at 58-59. The only possible modification to the *Freedman* requirements may have been anticipated in *FW/PBS, Inc. v. Dallas*, 110 S. Ct. 596 (1990), where three Justices asserted that a city licensing scheme aimed at the operation of sexually oriented businesses

need not include the third *Freedman* safeguard.[4] *See id.* at 607.

I do not doubt that the Ordinance satisfies the first requirement of rapid and certain administrative action. The Commissioner must make decisions between 35 and 65 days after filing for first time applications and within 10 days for renewal applications. *See* Chicago Mun. Code 10-28-160(c). The longer period is not an unreasonable start-up delay for a new business and can be accounted for by sound planning, and the shorter period both is brief and more importantly, if timely commenced, does not have to interrupt the operation of an existing newsstand. Further, after *FW/PBS*, it seems likely that *Freedman's* third requirement – that the licensor bear all court-

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[4] In *FW/PBS*, three Justices (Brennan, Marshall and Blackmun) thought that all three *Freedman* requirements were necessary, *see* 110 S. Ct. at 612-13 (Brennan, J., concurring in the judgment), while three (O'Connor, Stevens and Kennedy) were content with just the first two, *see id.* at 606-07 (opinion of O'Connor, J.). To justify dropping the third *Freedman* safeguard, Justice O'Connor distinguished Dallas' ordinance from the licensing systems in *Freedman* and its progeny on two grounds. She observed, first, that under its ordinance Dallas did not purport to "pass[ ] judgment on the content of any protected speech," *id.* at 607, unlike the obscenity censors in *Freedman et al.*, and, second, that because Dallas required a license to operate an adult entertainment business *at all*, "there is every incentive for the applicant to pursue a license denial through the court," *id.* All this is of course dicta since six Justices agreed that the ordinance must fall because the other two *Freedman* requirements did apply and were not satisfied. However, the three who propounded the more narrow reading of *Freedman* are still on the Court as well as one Justice (Rehnquist) who believed *Freedman* did not apply at all. *See id.* at 614 (White, J., concurring in part and dissenting in part).

related burdens – does not apply in this case. Chicago's ordinance is not designed to distinguish between protected and unprotected speech, and, like Dallas' ordinance in *FW/PBS*, it sets out a prerequisite to maintaining whole businesses, thus creating strong incentives to challenge adverse decisions. *See supra* note 4.

B.

While *Freedman's* first and third requirements are obstacles which the ordinance can clear, the second requirement plainly is not. Simply no provision is made for prompt judicial review. The majority tries to finesse this shortcoming by suggesting that the common law writ of *certiorari* stands as an adequate substitute for an explicit system of swift judicial review set out in the licensing law. Professing confusion about the rationale behind the Supreme Court's insistence on prompt review, the majority glosses over both that there is no indication in the record that Illinois' writ of *certiorari* is any quicker a judicial process than other common law actions and that review of administrative findings of fact is highly deferential in Illinois on *certiorari*. *See Norton v. Nicholson*, 543 N.E.2d 1053, 1059 (Ill. App. 1989), *appeal denied*, 550 N.E.2d 558 (Ill.), *cert. denied*, 496 U.S. 938 (1990). This is clearly not the sort of review *Freedman* envisioned. That Court was explicit about its concerns and holding:

> [B]ecause only a judicial determination in an adversary proceeding assures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid prior restraint. . . . Any restraint imposed in advance of a final

> judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . [A]n administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Freedman, 380 U.S. at 58-59 (citations omitted). In *FW/PBS*, Justice O'Connor reemphasized that judicial review must be promptly forthcoming "so as to minimize the suppression of the speech in the event of a license denial." *FW/PBS*, 110 S. Ct. at 606. This idea that speech delayed is speech denied and the recognition that "the censor's business is to censor," *Freedman*, 380 U.S. at 57, underlie *Freeman's* clear demand for a specialized system of prompt judicial review on the merits. And if *Freedman* were to apply to this case, there can be little doubt that the Ordinance must fall.

However, I believe that a close look at the holding and rationale of *Freedman* shows that it does not apply here of its own force. Moreover, uncritically extending *Freedman's* reach to strike down the Ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us upon a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the Ordinance, unlike the laws

challenged in that line of cases, is to involve the licensor in any decisionmaking of constitutional proportion.

Freedman and its immediate offspring involved various administrative attempts to ban obsence materials. Typically, bodies were set up to cull through the contents of expressive materials to decide whether or not to permit dissemination. If an administrative finding of obscenity or the like was made, a license would not issue, and the material could not legally be promulgated in the desired forum. *See Freedman,* 380 U.S. at 736 n.2 (Board of Censors approving films which are "moral and proper" and disapproving those which are "obscene, or . . . tend . . . to debase or corrupt moral or incite to crimes"); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 140 (1968) (*per curiam*) (licensing system examining films for obscenity); *Blount v. Rizzi,* 400 U.S. 410, 411-14 (1971) (postal censorship scheme inspecting mails for obscenity); *United States v. Thirty-seven Photographs,* 402 U.S. 363, 365-66 (1971) (custom agents confiscating imported obscene materials); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 548 (municipal theater directors rejecting performance of "Hair" believing show was obscene and thus not "in the best interest of the community"); *cf. Vance v. Universal Amusement Co.,* 445 U.S. 308, 316 & n.14 (1980) (*per curiam*) (state law authorizing state judges to enter temporary restraining orders and injunctions of indefinite duration against motion pictures without a final adjudication of obscenity).

Several themes emerged from this line of cases with regard to the necessity for procedural safeguards. The first, initially dominant theme permeated *Freedman* itself. There the Court's concerns focused on the institutional

tendency of censorship boards to overcensor. "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Freedman*, 380 U.S. at 57-58. Prompt judicial review and other procedural requirements were required to ameliorate the unacceptable risk of undue suppression of speech. *See id.* at 58.[5] This distrust of anything short of a full-blown judicial determination of the protected character of speech carried through the cases that followed[6] and together with the general distaste for unnecessary delay of speech underlaid the continuing insistence on prompt judicial review.

A second, and somewhat different, theme can be gleaned from the two most recent cases invoking *Freedman*. These cases did not involve licensing laws under

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[5] Note that the basic problem in *Freedman* was not unbridled discretion in administrative hands, but the inadequacy of administrative processes in general to demarcate the correct line between protected and unprotected speech. The Court did recognize, however, that these two very different shortcomings present a common danger: the risk of oversuppression of speech. *See id.* at 57.

[6] In *Southeastern Promotions*, the Court acknowledged that independent of an administrative board's ability to correctly categorize speech, it is always necessary that what the administrative body purports to decide constitutes a constitutionally permissible basis for preventing speech. *See Southeastern Promotions*, 420 U.S. at 558. But because the Court found inadequate procedural safeguards in the case, it did not reach the issue of whether as a substantive matter a production can be kept off a public stage because it is not deemed "culturally uplifting or healthful." *Id.* at 558, 561.

which administrative officials were overtly charged with making decisions of constitutional dimension. In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the Supreme Court examined a Maryland requirement that professional fundraisers be licensed before conducting charitable solicitations. The law did not purport to pass judgment on the expressive content of anticipated solicitation, but neither did it set a time limit within which the licensor was required to decide upon permit requests. *See id.* at 802. Because of the possibility of indefinite delay, nothing "effectively constrain[ed] the licensor's discretion," and the statute was struck down for lack of procedural safeguards. *Id. FW/PBS* also involved an administrative provision requiring that those who wished to engage in a particular line of business – in this case maintaining adult entertainment establishments – procure a special license. Here too "[the] regulatory scheme allow[ed] indefinite postponement of the issuance of a license." *FW/PBS*, 110 S. Ct. at 606. Expanding on what was intimated by the *Riley* Court, Justice O'Connor's opinion[7] pointed out that granting a licensor unlimited time to issue a license and vesting him with broad discretion in making the decision to issue are really two sides of the same coin: "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *Id.* at 605.

The common danger posed by licensors not anchored by either standards or time constraints is the opportunity for the content based suppression of speech. *See Lakewood,*

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[7] She was writing for three Justices. *See supra* note 4.

486 U.S. at 763-64. By manipulating loose standards or by delaying action, a licensor can suppress speech of which he disapproves. This grave risk, *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543-44 (1992), was presented by the non-time restricted processes in both *Riley* and *FW/PBS* and could be adequately abated only by the availability of prompt judicial review.

I believe that these cases indicate that the judgments we wisely do not trust to administrative officials without the benefit of a watchful judicial eye are those judgments that are made or are likely to be made in the First Amendment plane. *Cf. Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986) (reasoning that *because* "the agency shop itself impinges on the nonunion employees' First Amendment interests," a "reasonably prompt decision by an impartial decisionmaker" as to the appropriateness of mandatory contributions to a collective bargaining agent is necessary). Determinations of what is protected speech and determinations likely to be made according to one person's view of what is favored speech involve those sorts of judgments. As a corollary, then, schemes that abjure such judgments – unlike those in *Riley* and *FW/PBS* – should not be required to include a *Freedman* system of judicial review. *Cf. Hudson*, 475 U.S. at 307 n.20 (suggesting that *Freedman* procedures are not necessary in all situations involving First Amendment materials). Clearly included among such nonthreatening schemes are those that only ask *and* allow administrators to make the kind of determinations for which they are especially suited; *e.g.* questions about city aesthetics, traffic flow or City Code violations.

Certainly, the Ordinance is in that category of innocuous schemes which a specially mandated judicial review mechanism would only hamper through inappropriate and inefficient second-guessing of legitimate administrative decisions. As discussed, the Ordinance contains definite and reasonable time constraints as well as standards and a structure which effectively foreclose any serious opportunity for content based decisionmaking. It does not put before the licensor the authority, information or mechanism by which he could make decisions of direct First Amendment concern. Consequently, the Ordinance does not implicate the kinds of risks which should necessitate a special provision for judicial review.

IV.

Furthermore, I agree with the majority's conclusion that the place and manner restrictions that the Ordinance imposes on licensed newsstands fall within the limits of constitutional acceptability. For all of the foregoing reasons, I believe that the Ordinance survives facial attack and should be upheld. I therefore concur in the judgment.

RIPPLE, *Circuit Judge*, with whom CUDAHY and ROVNER, *Circuit Judges*, join concurring.

The significant number of opinions already filed in this case would, under most circumstances, be a substantial disincentive to another contribution by a single member of the court. The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States. Under such circumstances, we have an obligation to examine thoroughly the matter while it is before us.

We must frankly admit the source of our difficulty. The opinions of the Supreme Court in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990), and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), applied literally, appear to provide an analytical framework for the problem before us. My dissenting colleagues have filed a thorough exposition of this approach and, if the Supreme Court intends that *FW/PBS* and *Lakewood* be read and applied in such a formal fashion, this opinion has much to recommend it. By contrast, the principal opinion apparently finds the approach of these cases to produce an unrealistic result and seeks to avoid their application by recharcterizing the situation presented by this case as devoid of any expressive activity. In order to accomplish this feat, the principal opinion must declare that the placement of a newsstand, as opposed to a newsrack,

does not implicate expressive activity. I respectfully submit that this approach is untenable. In *Lakewood*, the Supreme Court expressly noted that the regulatory scheme at issue in that case involved "expression or conduct commonly associated with expression: the circulation of newspapers." 486 U.S. at 760. This case also involves the circulation of newspapers. The fact that one case involved a small, mechanical stand and the other a larger, manned stand cannot alter the reality that both involve expression. Indeed, the awkwardness of the plurality's attempt at a quick fix to this difficult problem is readily apparent in the opinion's subsequent reliance, despite its declaration that the First Amendment is not implicated, on a traditional First Amendment analysis – time, place, and manner regulation – to resolve ultimately the merits of the case.

In my view, we must frankly face up to the difficulty before us. This case *does* involve a First Amendment interest. Like Judge Flaum, I believe that, if *FW/PBS* and *Lakewood* do not govern our decision, we must be able to discern a principled doctrinal distinction between them and the case before us. A useful key to unlocking this analytical conundrum is, I believe, the established analysis applicable to time, place, or manner restrictions. For a very long time the Supreme Court has had to deal with even-handed attempts to regulate the exercise of expression in public forums. Parade or demonstration permits are the usual context in which these cases have arisen. The Court has evaluated such attempts by governments to bring order to the public forum under what is commonly known as time, place, or manner analysis. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288

(1984). The Court has "often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternate channels for communication of the information." *Id.* at 293; *see also Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other purposes of the streets.").[1]

If we are to apply this approach to the situation before us, we must deal frankly with *FW/PBS* and *Lakewood* which, our dissenting colleagues remind us, appear

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[1] The Court also has used time, place, and manner analysis to evaluate restrictions on expression outside the parade and demonstration context. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding noise ordinance under *Clark* time, place, and manner formulation); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (stating that zoning ordinance limiting placement of adult theatres was content neutral and valid as a time, place, manner regulation); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (holding state fair rule that required all distribution and sale of materials to take place from fixed location was reasonable time, place, and manner restriction); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771 (1976) (acknowledging time, place, manner analysis for restrictions "that are justified without reference to the content of speech, that . . . serve a significant governmental interest, and that . . . leave open ample alternative channels for communication of the information," but holding test inapplicable to ban on advertisement of prescription drug prices which made reference to content).

to have an easy application to this case. These two cases appear to apply prior restraint analysis to fact situations that are the functional equivalent of those situations that the Court had analyzed traditionally under the time, place, and manner analysis. Specifically, in *Lakewood*, the Court struck down as facially invalid an ordinance requiring a license to place newspaper dispensing machines on the city streets. Similarly, in *FW/PBS*, the Court struck down parts of an ordinance requiring the licensing of adult businesses. In both cases, the Court characterized the restriction imposed by the ordinance as a prior restraint and determined that its failure to comply with the stringent mandate of *Freedom v. Maryland*, 380 U.S. 51 (1965), rendered the ordinance unconstitutional.

We must determine why, in *Lakewood* and *FW/PBS*, the Court did not follow its usual approach of treating factual situations such as these as susceptible to time, place, and manner analysis and instead employed prior restraint analysis. What distinguishes the Court's treatment of licensing schemes in these two sets of cases is the presence of unfettered discretion. In both *Cox* and *Clark*, the Court dealt with the administration of an ordinance or regulation which proscribed the activity of the licensing authority. In fact, the *Cox* Court distinguished those cases in which government officials were unrestrained in their power to grant or deny permits. 312 U.S. at 577. In both *Lakewood* and *FW/PBS*, however, there was unfettered discretion to grant or deny the license – in *Lakewood* pursuant to the very language of the ordinance and in *FW/PBS* pursuant to the way the licensing official could delay the licensing decision, presumably indefinitely. This type of discretion, in the Court's eyes, "gives a

government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Lakewood*, 486 U.S. at 759. It also presents the possibility of self-censorship. *Id.* Because of these concerns, the Court in *Lakewood* struck down the ordinance absent "neutral criteria to insure that the licensing decision is not based on the content," *id.* at 760, and, in *FW/PBS*, struck down the ordinance absent the procedural guarantees of *Freedman*, 493 U.S. at 228.

The concerns the Court voiced in both *Lakewood* and *FW/PBS* are not present here. The Chicago ordinance sets forth criteria according to which a permit must be evaluated. Furthermore, there is a time limit within which city officials must respond to the application. In no way does the ordinance place unfettered discretion in the hands of city officials. As a result, there is no risk of either hidden or self censorship.[2] It is the absence of this discretion, and

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[2] *Lakewood* hints at this distinction. In excepting building permits from the scope of its holding, it noted that its holding did not apply to "laws of general application that are not aimed at conduct commonly associated with expression." *Lakewood*, 486 U.S. at 760-61. It noted that, although such laws of general application are subject to abuse, the abuse easily can be detected because "the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision." *Id.* at 761. Here, we do not deal with laws of general applicability. As demonstrated in the text, however, we do deal with a statute whose structure and operation render content-based abuse at the hand of governmental officials detectable in a relatively easy manner.

the risks inherent in it, which allows us to evaluate the ordinance according to the guidelines of *Cox*, *Clark*, and, as the plurality mentions. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

I therefore respectfully submit that time, place, and manner analysis is an appropriate analytical tool for the assessment of this statute and, like my colleagues who have joined the principal opinion, I believe that the ordinance in question can be sustained on this basis. I hasten to add, however, that there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States. City officials ought to be able to address matters as basic as the regulation of newsstands on the city streets in a more expeditious manner than afforded by litigation of this sort.

CUMMINGS, *Circuit Judge*, with whom BAUER, *Circuit Judge*, and FAIRCHILD, *Senior Circuit Judge*, join, dissenting. I agree with the majority that no person has an inherent or fundamental right under the Constitution to build a structure on public property, but my agreement with Judge Manion's opinion ends there. The issue is not whether a municipality may regulate speech taking place on a public sidewalk – of course it may – but what the city must demonstrate to justify the regulation. *Hague v. CIO*, 307 U.S. 496, 515-516. I respectfully dissent because the majority's decision is at odds with two recent Supreme Court decisions: *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, and *FW/PBS v. City of Dallas*, 493 U.S. 215. In each case, the Court struck down municipal licensing schemes that regulated some form of speech – in *Lakewood* newsracks, and in *FW/PBS* sexually oriented businesses – because the ordinances placed too much power in the hands of a city official. The Court feared that the city official might abuse his authority by discriminating against the speaker based on the content of his speech. In the present case, Chicago also seeks to license First Amendment activity and in so doing has vested a city administrator with the power of content discrimination.

By upholding the Chicago ordinance, the majority ignores or contradicts *Lakewood* and *FW/PBS* in at least three respects. First, Judge Manion contends that Chicago's newsstand ordinance does not implicate the First Amendment at all because it merely regulates conduct, not speech. This is unsupportable. *Lakewood* struck down a regulation of newsracks as a prior restraint under the First Amendment, and newsracks and newsstands are as

close an analogy as one is likely to find. Not even the majority seems persuaded by this view of the First Amendment, since the opinion goes on to analyze Richard Graff's challenge in constitutional terms. Second, *Lakewood*, *FW/PBS* and a long series of earlier decisions review licensing schemes directed at First Amendment activity as prior restraints on speech that are valid only if the licensor's power is checked by procedural safeguards. The majority, however, frames Chicago's ordinance as merely a time, place and manner regulation, not a prior restraint, and subjects it to only the most deferential scrutiny. Third, *FW/PBS* requires an ordinance like Chicago's to provide for prompt judicial review of the decision to deny a license – and *FW/PBS* shows that common law certiorari cannot meet this requirement. Yet the majority upholds Chicago's newsstand ordinance (which is silent on the subject of judicial review) on the ground that common law certiorari is available. Today's decision can only sow confusion in First Amendment jurisprudence and weaken the protections it affords for newsstand operators and others as well.

Because *Lakewood* held that erecting newsracks on public property is speech protected under the First Amendment, the majority must explain how newsstands differ from newsracks if it is to hold that the former do not constitute speech. According to the opinion, "newsstands compared to newsracks are much larger, more permanent structures that occupy a significant portion of limited sidewalk space. Thus, building and operating a newsstand is conduct not speech * * * " (at p. 11). The argument, in essence is that newsstands receive less First Amendment protection than newsracks because they hold

more opinions and are bigger. With all due respect, these distinctions cannot remove newsstands from the First Amendment. It is true that the size of newsstands might make them a more inviting subject of municipal regulation, although one large newsstand produces less clutter than several newsracks chained to various street lamps. Yet size itself suggests nothing about whether the selling of newspapers and magazines from a stand is speech or conduct. And since the First Amendment is all about seeing to it that citizens have access to a wide variety of opinions and information, the fact that stands offer more opinions than racks would suggest that they should receive greater, not lesser protection. Cf. *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring); *Associated Press v. United States*, 326 U.S. 1, 20; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266. Newsracks might be a more convenient target for content discrimination because they sell discrete products, but this fact is also irrelevant in the initial judgment about whether the operation of a newsstand is conduct or speech.

In truth, it is both. Cf. *Texas v. Johnson*, 491 U.S. 397; *Cohen v. California*, 403 U.S. 15; *Tinker v. Des Moines School District*, 393 U.S. 503. As the majority points out, erecting a structure on a sidewalk is a physical act. But Graff did not seek a permit merely to build a stand on the public pavement; he also wanted permission to show up every morning and hawk his newspapers and magazines from its confines, just like the publisher in *Lakewood* who used newsracks to sell papers. There is of course no inherent First Amendment value in the mundane activity of placing metal boxes on street corners. Nevertheless, the boxes in *Lakewood* received constitutional protection because

they made the distribution of First Amendment material easier. Here the city argues that Graff can sell his papers and magazines from the sidewalk without the stand, but this misses the point. The stand is an implement of commerce that facilitates the vendor's free speech. Graff's newsstand gives him greater visibility, a stable location, and the ability to sell a wide variety of publications. The publishers in *Lakewood* could also have sold their papers without newsracks by simply leaving piles of papers on street corners under rocks – with honest purchasers depositing their quarters in small cups. But the Supreme Court has long recognized that the First Amendment protects the expression of ideas as well as ideas themselves, and that distribution is an inseparable part of expression. See, *e.g., Smith v. California,* 361 U.S. 147, 150. To hold otherwise would be to elevate form over substance; one might as well say that publishing a newspaper is purely conduct because, after all, putting ink to paper is a physical act. Moreover, the speech the city seeks to regulate here takes place on a traditional public forum: the sidewalk. *Hague,* 307 U.S. at 515-516. I do not suggest that all regulation is inappropriate. But to pretend that the First Amendment does not come into play at all is mistaken. As Justice Roberts said in *Hague,* the right of citizens to use the sidewalk for speech "is not absolute, but relative * * * . but it must not, in the guise of regulation, be abridged or denied." *Id.*

A second fallacy underlies the majority's discussion. It is that newsstand operators such as Graff do not need the protections of the First Amendment because the potential for abuse is small. The majority suggests both that Chicago lacks the means and will to discriminate on

the basis of content, and that newsstands, since they are not associated with one particular publication, are not likely targets of such discrimination. This reasoning is undoubtedly behind the majority's failure to recognize that licensing of newsstand operators constitutes a prior restraint. But newsstand operators do have a point of view based on the publications they choose to peddle. Their decisions to sell or not sell pornography, religious literature and political publications are matters of judgment, advocacy and editorial discretion, like booksellers. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495; *Grosjean v. American Press Co.*, 297 U.S. 233; *Smith v. California*, 361 U.S. 147, 150. Recall that Graff's suit like *FW/PBS* and *Lakewood* is a facial challenge; thus the harm is necessarily theoretical. As the majority correctly points out it is unlikely that the mayor in a pique over an unfavorable editorial would order municipal employees to revoke the license of every newsstand selling the *Chicago Tribune* (*i.e.*, every newsstand in the city). But it is hardly a stretch to imagine city officials using the threat of license renewal to combat the prevalence of pornographic but perfectly legal magazines on the sidewalks. Nor is it difficult to imagine officials angry over articles in one of the many smaller, less visible weekly publications sold in Chicago, threatening newsstand operators who refuse to drop the offending organ. The majority suggests that even if every newsstand were closed, the *Chicago Tribune* would have other methods of distribution including newsboys, newsracks and in-building newsstands. This is true enough for the *Chicago Tribune*, but not so for the hundreds of other, smaller, off-beat publications that are available only at newsstands. To these publications,

newsstands – where the marginal cost of carrying an additional paper or magazine is low – represent the only access to the marketplace; after all, not every publisher can afford to blanket the city with newsracks or persuade bookstores paying premium rents to sell its product.

Moreover, contrary to the majority's assertions, the ordinance at issue does leave room for city officials to punish newsstands based on content. Though at first blush the statute offers elaborate procedural guidelines for the issuance and denial of permits, these are illusory. For example, Section 10-28-160(a) outlines procedures for hearings and reports by which a City Council committee is to comment on a proposed newsstand license. But these procedures are entirely optional. Under the ordinance the City Council could decide not to comment on newsstand applications at all. In addition, in each case not involving an historical landmark, the Commissioner of Public Works is the sole, unfettered decisionmaker. It is a measure of the leniency of the city's criteria that Graff's application was ultimately denied even though his stand has operated at the same site for approximately seventy years; the ordinance instructs the Commissioner to consider a stand's longevity before granting or denying a permit, but this did not help Graff. Perhaps the most glaring deficiency in the ordinance, however, is the lone reference to subsequent review of the Commissioner's decision. Under Section 10-28-160(c), a vendor whose application is denied has ten days to request a hearing "at which he will be given an opportunity to prove that the determination of the Commissioner was in error." The ordinance does not define error or specify what proof is required. And the person who reviews the decision by the

Commissioner of Public Works is none other than the Commissioner of Public Works! The ordinance merely instructs the Commissioner to issue a permit promptly if he "determines that his previous determination was incorrect." Chicago Mun. Code § 10-28-160(c). Give the lack of genuine means for appeal, judicial or otherwise, and the purely optional nature of these procedures, the city's standards are mere window-dressing rather than a practical check on the power of the administrator.

The city contends that any attempt at content discrimination would fail because permit applications do not contain a list of what publications a particular newsstand sells. This is hardly comforting. City officials, were they so inclined, could stroll over to a stand and examine for themselves what magazines are sold. The ordinance also contains no minimum or maximum limit on the number of permits issued. Thus were the Commissioner seeking to punish a stand for selling a specific publication, he would not face the obstacle of having to find a replacement vendor. Officials also are expressly instructed under the ordinance to give preference to stands selling the most daily newspapers. The majority characterizes this provision as "an obvious attempt at variety, not indoctrination" (at p. 22). But why does Chicago feel compelled to state a preference when the marketplace itself will prompt newsstand operators to carry more dailies if, as the majority maintains, they reach the most number of people? This looks like an attempt by officials to curry favor with the most powerful press in the city.

Each of these deficiencies is aggravated by the silence of the ordinance on the subject of judicial review. Here is

where the Chicago regulation runs smack into a constitutional wall. The majority tries to steer around the wall by holding that the ordinance is not a prior restraint and subject to merely time, place and manner analysis. The majority's view ensues from its treatment of the Chicago regulation as a zoning ordinance rather than a licensing scheme. Thus the majority analogizes Graff's challenge to *City of Renton v. Playtime Theatres*, 475 U.S. 41. In that case the Court upheld a municipal ordinance prohibiting adult theaters from setting up shop close to a house, church, park or school. The Court applied a time, place and manner analysis – that is, the justices asked only whether the ordinance was designed to serve a substantial governmental interest and whether it allowed for reasonable alternative avenues of communication. *Id.* at 50. But the ordinance in *City of Renton* was a zoning restriction – that is, it established rules that applied across the board to all similarly situated enterprises. There was no threat in *City of Renton*, then, that a decisionmaker would discriminate against individual merchants based on the content of what they sold. Under a licensing scheme, by contrast, a city official is vested with the power to make decisions regarding individual permit applicants. The Chicago ordinance – where an official grants or denies individual permit applications and then reviews the permits periodically – is analogous not to the ordinance in *City of Renton* but to the ordinances in *FW/PBS* and *Lakewood*.

Chicago's licensing scheme represents a classic prior restraint because it forces news vendors to apply for a permit from local officials before they can sell newspapers and magazines; the city itself assumes the power to regulate speech and puts the authority of denial in the

hands of one official. As the Court said in *Lakewood*, "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." 486 U.S. at 759. There the Court recognized two critical factors – both present in this case as well – that identified a licensing scheme subject to facial challenge. First, businesses had to apply for licenses that were periodically renewed by the issuer. Second, the licensing system was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id.* at 760. The Chicago ordinance is also directed specifically at newsstand operators: "It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand * * * without obtaining a permit * * * ." Chicago Mun. Code § 10-28,130.

A licensing scheme that operates as a prior restraint, as opposed to a zoning ordinance, is subject to more intense scrutiny than mere time, place and manner analysis; the regulation must also provide adequate procedural safeguards to prevent city officials from abusing their discretion. The Supreme Court has held in a long line of cases that authority exercised to administer a licensing scheme must be bounded by clear and precise standards where officials have the power to foreclose speech in public places. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151; *Staub v. City of Baxley*, 355 U.S. 313, 322; *Kunz v. New York*, 340 U.S. 290, 293-294; *Schneider v. State*, 308 U.S. 147, 161-162; *Hague v. CIO*, 307 U.S. 496. A prior restraint "avoids constitutional infirmity

only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58. An ordinance must contain explicit limits on the decisionmaker's discretion. *Lakewood*, 486 U.S. at 769. It is also clear that these limits must exist whether or not a municipal ordinance also happens to pass muster as a time, place and manner restriction. In *FW/PBS*, for example, the plurality did not even reach the time, place and manner question because the procedural safeguards in that ordinance were inadequate. 493 U.S. at 223.

It is thus both surprising and dismaying that the Court's decision today focuses so heavily on the merits of the Chicago ordinance as a time, place and manner restriction, to the exclusion of its other failings. Given the lack of sufficient procedural safeguards, the majority's discussion of time, place and manner is interesting, but beside the point. Under *FW/PBS*, which by the way follows from a long line of cases setting forth similar standards, a city may only license a business associated with First Amendment freedoms, if first, the licensor is obligated to grant or deny the permit within a specified and reasonable time during which the status quo is maintained and, second, if there is the possibility of prompt judicial review in the event the license is erroneously denied. *Id.* at 228. A ministerial action denying a license is not presumptively invalid, unlike most prior restraints, and the city is not required to justify its decision in court on every occasion. *Id.* at 607. However, the vendor denied a license must be able to seek prompt judicial review, and the absence of review is fatal. See *Southeastern Promotions*,

420 U.S. at 561-562; *FW/PBS*, 493 U.S. at 229;[1] *Freedman*, 380 U.S. at 58; cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442-443.

Even the majority admits that in *Freedman* the Supreme Court has "set out the apparent requirement that an ordinance such as this explicitly provide for prompt judicial review" (at p. 29). Since the Chicago ordinance makes no mention of prompt judicial review, and indeed provides no mechanism for it, it must be invalid. According to the majority, however, "it is not clear" why the *Freedman* Court chose to require that licensing schemes make explicit provision for prompt judicial review when common law certiorari is available (at p. 29). The majority uses its confusion as an excuse simply to ignore the requirement by stating that the availability of common law certiorari is an adequate form of judicial review when an ordinance is otherwise silent. The majority's conclusion is in direct conflict with *FW/PBS*, 493 U.S. at 229. In that case, the Supreme Court held that a municipal ordinance – where of course appeal by common law certiorari was also available – was invalid in part because it "fail[ed] to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold

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[1] The majority suggests that reliance on *FW/PBS* is misplaced because part of Justice O'Connor's opinion was joined by only two other justices. But three other justices concurred in the judgment and criticized Justice O'Connor's position because the procedural safeguards she prescribed were not strong enough!

that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity * * * ." 493 U.S. at 229. In fact, the ordinance struck down in *FW/PBS* for want of judicial review had a more elaborate appeals procedure than Chicago's newsstand ordinance, including the right to take one's case to a permit and license appeal board and to an automatic stay during those proceedings.[2] Clearly, if the ever-present availability of common law certiorari was unable to cure the ordinance in Dallas, it cannot save the Chicago ordinance either. The majority's holding to the contrary puts this Circuit at odds with an explicit and oft-repeated mandate from the Supreme Court.

Common law certiorari is insufficient because it is much too slow and uncertain as a mechanism for safeguarding speech. It is an unfortunate fact of life in the modern court system that it may take years, and cost a plaintiff a great deal of money, before his complaint receives a hearing on the merits. Contrast that with the traditional vigilance First Amendment jurisprudence has shown toward prior restraints on speech:

> Any system of prior restraint * * * "comes to this Court bearing a heavy presumption against its constitutional validity." * * * The presumption against prior restraints is heavier – and the degree of protection broader – than that against

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[2] The Dallas ordinance is reprinted as an appendix to the district court's decision in *FW/PBS*. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1084-1085 (N.D. Tex. 1986).

> limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n.13 (citations omitted). To force a purveyor of First Amendment materials whose speech has been stifled to wait months, if not years, for a court to pass judgment on his case is anathema to prior restraint law. See *Kingsley Books*, 354 U.S. at 438-443 (upholding procedural safeguards where statute required obscenity hearing within one day of charge, and judicial decision within two days of hearing). Moreover, under common law certiorari the government is as a general rule not enjoined from prohibiting speech while the case is being appealed. Chicago profits by delay while the speaker and audience suffer.

The majority posits the curious argument that Illinois law prevents municipalities from specifying what form of judicial review an administrative decision must receive. Perhaps. But since when does a city gain special dispensation to violate the United States Constitution because a state law contradicts it? Under the Supremacy clause, the state law must give. Nor is it clear that Illinois law does prevent Chicago from specifying a form of prompt judicial review. The cases cited by the majority, *Nowicki v. Evanston Fair Housing Review Board*, 62 Ill. 2d 11, 338 N.E.2d 186 (1975), and *Quinlan & Tyson, Inc. v. City of*

Evanston, 25 Ill. App. 3d 879, 324 N.E.2d 65 (1st Dist. 1975), stand mainly for the proposition that Illinois cities lack the power to alter the jurisdiction of state circuit courts. This would not prevent the municipality from specifying an expedited procedure, or petitioning the state legislature for a minor change in the law, or even setting up an administrative review procedure at least to blunt the unfairness of having the Commissioner of Public Works act as the primary reviewer of his own decisions.

The majority's approach to Graff's challenge is confusing indeed. After today's decision, it is unclear who may bring facial challenges, whether licensing schemes directed at First Amendment activity are to be analyzed as prior restraints, whether a licensing restriction aimed purportedly only at the time, place and manner of speech must include procedural safeguards, and whether those safeguards must encompass prompt judicial review. Indeed, it is not even clear after today's decision whether selling newspapers from anything other than a corner box implicates the First Amendment. While regulation of the typical modern newsstand, with its shabby mix of magazines specializing in pornography, tattoos and motorcycles, may not arouse passionate concern about the denial of free speech, newsstands remain an important sector of the newspaper industry, particularly in a big-city market such as Chicago. See amici curiae of *Chicago Tribune, Chicago Sun-Times* and Gannett Satellite Information Network, Inc., publisher of *USA Today*. The city's regulation thus strikes at the core of the First Amendment. I would

hold that Chicago may regulate newsstands,[3] but that its burden must be higher than what the Court requires today – a burden that the Chicago ordinance in its present form cannot meet because of the absence of judicial review. Because of the confusion that will inevitably flow from the majority decision, I respectfully dissent.

A true Copy:

Teste:

/s/ _____
Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] The newsstand in question harmonizes with the appearance of the adjacent former Chicago Public Library, is set unobtrusively at the edge of one side of the building, does not interfere with its maintenance and does not block the sidewalk.

Richard GRAFF, Plaintiff-Appellant,

v.

CITY OF CHICAGO, Defendant-Appellee.

No. 92-2352.

United States Court of Appeals,
Seventh Circuit

Argued Oct. 1, 1992.

Decided Feb. 16, 1993.

Order Granting Rehearing En Banc and Vacating Opinion April 15, 1993.

Matthew J. Piers, Jonathan A. Rothstein (argued), Gessler, Flynn, Fleischmann, Hughes & Socol, Chicago, IL, for plaintiff-appellant.

Eileen T. Pahl, Ruth M. Moscovitch, ACC, Bobbie McGee Gregg, Asst. U.S. Atty. (argued), Kelly R. Welsh, Asst. Corp. Counsel, Benna R. Solomon, Office of the Corp. Counsel, Appeals Div., Chicago, IL, for defendant-appellee.

Before CUMMINGS and MANION, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

CUMMINGS, Circuit Judge.

Richard Graff is in the business of selling newspapers and magazines adjacent to the Randolph Street entrance to the City of Chicago Cultural Center, formerly the flagship building of the Chicago Public Library. It is a prized location; a newsstand has operated on approximately the same site for seventy years. After Mr. Graff bought the stand in 1984 for $53,000, he applied several times for a permit. The city denied his application in each instance

because, it said, the municipal policy toward newsstands was under review and the city was issuing no new permits, even to those with existing newsstands. Apparently Chicago allowed permitless stands to operate during this period. In 1987 Mr. Graff moved his stand from the east to the west side of the steps of the Randolph Street entrance to make way for construction crews. He did so at the behest of the city, though the parties dispute whether Mr. Graff was forced to move or he agreed to do so. Subsequently, the city sent Mr. Graff a series of notices ordering him to remove the structure entirely. Each of these notices was rescinded after consultations between Mr. Graff's lawyers and municipal officials. When Mr. Graff applied once again for a permit, he was told that the city was still not issuing them, though Mr. Graff claimed to have evidence to the contrary. Concerned that he would be driven out of business, Mr. Graff filed this suit in district court alleging that Chicago's ordinance regulating newsstand operators violated the Commerce Clause and the First and Fourteenth Amendments to the Constitution. The plaintiff also sought injunctive relief to stop the city from enforcing its ordinance against him.

On June 28, 1991, some four months after Mr. Graff lodged his complaint, the City Council approved a new ordinance regulating newsstands. CHICAGO, ILL.MUN.CODE §§ 10-28-130-10-28-192 (1991).[1] The new ordinance is more specific about what factors city officials should consider in issuing permits; it also eliminates a provision

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[1] Relevant portions of the ordinance are attached as an appendix.

in the old law that favored newsstands selling publications printed in Chicago. Mr. Graff then amended his action to attack the constitutionality of the new city ordinance under the First and Fourteenth Amendments, and he again requested injunctive relief. Sometime later Mr. Graff also filed a new permit application, which the Commission on Chicago Landmarks denied. In the court below, the city defended its ordinance as a content-neutral time, place and manner regulation. The district court, finding that Mr. Graff had mounted only a facial challenge to the newsstand law, upheld the constitutionality of the ordinance, 800 F.Supp. 576. Thus the court dismissed two counts of the complaint attacking the new ordinance, denied injunctive relief as moot, and removed Mayor Richard M. Daley as a defendant.[2] the district court did preserve one count of Mr. Graff's complaint based on the city's allegedly arbitrary and irrational treatment of his various applications for a permit under the old ordinance. The city does not contest the district court's decision to retain this one count.

As to the other two counts which the district court dismissed, we reverse. Because it gives too much discretion to an unelected decisionmaker, the Chicago ordinance violates the First Amendment of the United States Constitution.

I.

As a preliminary matter, defendant argues that this Court lacks jurisdiction to hear plaintiff's appeal because

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[2] Plaintiff does not contest dismissal of Mayor Daley.

the judgment below is not final. Plaintiff asserts that we have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to hear appeals from an interlocutory order denying injunctive relief. The district court dismissed with prejudice counts one and two of Mr. Graff's complaint. As a result, Judge Lindberg concluded that plaintiff could not prevail on the merits of his claim and so denied his motion for what the judge called a temporary restraining order. Defendant is correct that denial of a temporary restraining order is not appealable. *Geneva Assurance Syndicate Inc. v. Medical Emergency Services Ass'n,* 964 F.2d 599, 600 (7th Cir.1992) (per curiam). However, the character of the injunctive relief sought, not what the judge happens to call it, will determine whether it may be appealed. *Sampson v. Murray,* 415 U.S. 61, 85-88, 94 S.Ct. 937, 950-952, 39 L.Ed.2d 166 (1974). Temporary restraining orders are for brief periods (ten days plus one ten-day extension for good cause under Federal Rule of Civil Procedure 65(b)), *ex parte,* and informal. *Geneva Assurance Syndicate,* 964 F.2d at 600. In this case, Mr. Graff stated in his amended complaint that he sought a "preliminary and permanent injunction" against the city, not a temporary restraining order. The party's characterization of the relief sought is no more controlling than the judge's. In this case, however, a ten-or twenty-day injunction would have done little for Mr. Graff. Also, his prayer for relief was lodged in a formal complaint involving the opposing party. In no sense was Mr. Graff asking for a brief, *ex parte,* informal temporary restraining order; he was asking for a preliminary injunction, the denial of which is appealable to this Court.

The city also quotes *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), for the proposition that a party may not appeal an interlocutory order dismissing some, but not all, counts of a complaint while denying a motion for a preliminary injunction as moot. The defendant tries to fit this case under the rubric of interlocutory orders that have the *practical effect* of denying injunctive relief, as opposed to interlocutory orders that deny injunctive relief directly. According to defendant, the former may not be appealed unless the party can show (1) serious, perhaps irreparable consequences and (2) the order can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 84, 101 S.Ct. at 996. Defendant's argument falters because this is not a practical effect case; the judge explicitly denied plaintiff's prayer for injunctive relief. Moreover, the cases cited by Justice Brennan in *Carson* to illustrate the irreparable injury requirement concerned plaintiffs who had not filed motions seeking a preliminary injunction. 450 U.S. at 84-86, 101 S.Ct. at 996-997. As we concluded above, Mr. Graff did petition the district court for a preliminary injunction.

Our decision in *Holmes v. Fisher*, 854 F.2d 229, 231 (7th Cir.1988), explicitly rejected the approach taken by some courts of requiring irreparable injury where there is no question that the plaintiff was denied injunctive relief: "Section 1292(a)(1) is decently plain: all interlocutory orders denying injunctions are appealable." *Id.* Yet even if this were a practical effect case, Mr. Graff would have little difficulty meeting the irreparable injury requirement. By denying his claim for injunctive relief and by

dismissing his constitutional challenge to the new ordinance, the lower court left the city free to force Mr. Graff out of the news-selling business, and the city did precisely that a short two months after the district court rendered its judgment. It is hard to imagine a more compelling case of irreparable injury.

II.

This suit could involve as many as three separate claims: an as-applied challenge under the old ordinance, an as-applied challenge under the new ordinance, and a constitutional challenge to the new ordinance on its face. The facts surrounding Mr. Graff's treatment by defendant under the old ordinance are ultimately unnecessary to this discussion because the district court did not resolve those issues. Therefore, the as-applied attack on the previous ordinance is not properly before us. Similarly, we need not consider Mr. Graff's as-applied challenge to the new ordinance – assuming he raised such a claim – because the ordinance itself violates the Constitution.[3]

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[3] Plaintiff had not applied for a permit under the new ordinance at the time he filed his amended complaint. This fact leads defendant to argue that Mr. Graff is precluded from raising an as-applied challenge to the new ordinance. What the city forgets is that Mr. Graff not only attacked the constitutionality of the ordinance in his amended complaint; he also requested injunctive relief. By asking the district court for a preliminary and permanent injunction restraining the city from enforcing its ordinance against him personally, plaintiff raised what amounts to an as-applied challenge. Nor can Mr. Graff be faulted for a failure of persistence in attempting to acquire a permit. He was rebuffed each of the several times he tried to apply. At the same time, the Commission on Chicago Land-

Mr. Graff is well placed to bring a facial challenge to the Chicago ordinance. In the free speech context, a plaintiff is entitled to challenge the constitutionality of a statute for delegating overly broad licensing discretion to an administrator, even if his conduct could be prescribed by a properly drawn statute. *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737-738, 13 L.Ed.2d 649 (1965). One has standing to make such a challenge to the face of a law even if the person has not applied for a permit or license. *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940). Courts are willing to overlook the usual requirements of the case or controversy doctrine in the First Amendment arena because of the fear that people will censor themselves, and because it is difficult to detect, review and correct content-based discrimination without standards by which to measure the licensor's action. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759, 108 S.Ct. 2138, 2145, 100 L.Ed.2d 771 (1988). "Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Id.* at 757, 108 S.Ct. at 2144.

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marks did not deny Mr. Graff's application for a permit under the new ordinance until August 5, 1992, more than two months after the district court decided this case. This Court is hardly in a position to overturn a district court decision based on facts occurring after the lower court decision was rendered. In any event, it is unnecessary for us to resolve this issue because the ordinance is itself unconstitutional.

We also need not delve into plaintiff's contentions that the newsstand ordinance violates the Equal Protection Clause of the Fourteenth Amendment based on the city's allegedly favorable treatment of sidewalk cafes and vendors of items such as T-shirts as against newsstand operators.

Just as in *Lakewood*, the licensing scheme in the instant case has two features that permit a facial challenge. First, vendors must apply for licenses that are periodically renewed by the issuer. Second, the licensing system at issue here is "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id.* at 760, 108 S.Ct. 2145. The Chicago ordinance is directed specifically at newsstand operators: "It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand * * * without obtaining a permit * * * ." CHICAGO, ILL.MUN.CODE § 10-28-130 (1991).

The city implies, and Judge Manion's dissent adopts the view, that Mr. Graff should not be permitted to bring a facial challenge because the Chicago ordinance does not regulate expressive conduct; in other words, the ordinance is outside the reach of the First Amendment (defendant's brief at 16-23). The dissent further contends that the ordinance does not vest unbridled discretion in a city official. Recall that under *Lakewood*, "a facial challenge lies whenever a licensing law 'gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.'" *Id.* at 759, 108 S.Ct. at 2145. To a large extent, then, one's ability to mount a facial challenge depends on the resolution of the substantive questions of whether speech is implicated and whether decisionmakers have excessive authority. For the reasons set forth in this opinion, with which the dissent obviously disagrees, we conclude that the newsstand business implicates the First Amendment, that the

ordinance vests excessive discretion in unelected administrators, and that a facial challenge to the city's licensing scheme is appropriate.

Mr. Graff disseminates newspapers and magazines; this activity goes to the heart of the First Amendment because the publications he sells give citizens vital information about public affairs. It is irrelevant that the newspaper vendors who are affected by the ordinance engage in this activity for profit. *Smith v. California*, 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964). Nor is it relevant that these vendors do not have a hand in writing or publishing what they sell. It is doubtful, for example, that the Jehovah's Witnesses who distributed pamphlets and magazines in *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), wrote the materials herself, yet this fact did not stop the Supreme Court from overturning Mrs. Lovell's conviction under a constitutionally flawed licensing scheme. And our decision in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (1985), *affirmed*, 475 U.S 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986), striking down an Indianapolis ordinance that outlawed pornography, did not grant the plaintiffs any lesser measure of First Amendment protection because they were book vendors rather than book writers. In other words, the First Amendment does not discriminate among those who peddle their own ideas and those who peddle the ideas of others.[4]

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[4] The dissent suggests that newsstand operators are not advocates for a point of view and so, presumably, are not

As part of its argument that newsstands are not protected by the First Amendment, the city maintains that the central issue of this case is not Mr. Graff's freedom of expression but the right, or lack of right, to erect structures on public property. As defendant put it, "Graff can stand on the public way anywhere in the City and offer newspapers for sale" (defendant's brief at 20). This misses the point. Taking away a speaker's microphone may muzzle his speech as effectively as putting tape across his mouth. See *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (overturning ordinance that prohibited use of loudspeaker in public places without permission of chief of police). For obvious reasons, Mr. Graff finds the physical structure of the newsstand instrumental to his business: disseminating information. The stand gives him greater visibility, a stable location, and the ability to sell a wide variety of publications. Of course he can sell papers without the stand, as defendant flippantly suggests, but he can't sell them as effectively – imagine Mr. Graff standing on the streetcorner trying to hang on to dozens of magazines while Chicago's wind whips the papers out of his grasp. In *Lakewood* the

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deserving of full First Amendment protection. This proposition is empirically questionable, since newsstand operators do choose which publications to carry. Their decisions to sell or not sell pornography, religious literature and political publications are matters of judgment, advocacy and editorial discretion. In any event, there is nothing in First Amendment jurisprudence that modulates the level of protection based on how strongly the speaker identifies with the speech. The dissent's suggestion that only advocates should receive First Amendment protection would have dire consequences for, among others, publications that purport to report the news objectively.

Supreme Court recognized the constitutional significance of such implements of commerce when it struck down an ordinance regulating the placement of newsracks on public property. *Lakewood*, 486 U.S. 750, 108 S.Ct. 2138. If newsracks receive First Amendment protection, so do newsstands.[5]

The dissent chastises this analogy between newsstands and newsracks and maintains that the erection of newsstands is conduct, pure and simple. Divorced from the activity of distributing literature, the building of a stand on the sidewalk is indeed non-expressive conduct. Yet one cannot separate the activity involving the structure from the structure itself. Placing newsracks on public property is no more expressive in nature than building a newsstand. If there were no newspapers in the racks, there would have been no First Amendment issue in

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[5] The dissent argues that the standards we now apply would condemn the ordinance upheld in *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir.1991). Not so. In *Chicago Observer*, the city merely regulated the size of newsracks; it did not exercise licensing power to deny permit applicants the means to conduct business related to the First Amendment. Moreover, the ordinance in *Chicago Observer* was directed at advertisements plastered on the outside of the boxes. Commercial speech receives lesser protection under the First Amendment. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). An ordinance regulating merely the size of newsracks and the advertisements on their front is not relevant to this discussion. Indeed, if we were to adopt the dissent's expansive view of *Chicago Observer*, that decision would be at odds with the Supreme Court's decisions in *Lakewood* and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

Lakewood. The Supreme Court found it necessary to protect newsracks in *Lakewood* not because there was any inherent First Amendment value in the mundane activity of placing metal boxes on steetcorners, but because the boxes facilitated the distribution of First Amendment material. Similarly, there is nothing mystical about a newsstand. There would be no First Amendment question if the city sought to regulate the erection of structures so that vendors could sell soda from the sidewalk. See *id.* at 761, 108 S.Ct. at 2146. Newsstands, however, serve only one purpose: to distribute literature, and the Supreme Court's analysis in *Lakewood* does not allow for disentangling the structure from the use made of the structure. The dissent finds newsstands different from newsracks because the latter are less permanent, smaller and "[w]hen they need fixing, they get repaired, not replaced" (at p. 1071). The significance of these distinctions is elusive. Most newsracks remain on the same corners for years and are permanent fixtures on the streetscape, just like newsstands. With all due respect, the First Amendment cannot turn on the trivial distinction that rusted newsracks are replaced while weather-beaten newsstands are repaired with hammer and nails. The physical nature of the structure does not dictate the First Amendment protection it receives because the newsstand or newsrack is merely the conduit; and surely the recipients of First Amendment literature do not care whether their newsstand is repaired or replaced.

Judge Manion suggests that newsstands are more analogous to bookstores than to newsracks. Yet if the city had passed an ordinance directed specifically at the licensing of bookstores, is there any question that we

would scrutinize the ordinance for its effect on free expression? In fact, the majority opinion in *Lakewood* specifically rejected the parallel drawn in Justice White's dissent – cited frequently by today's dissent – between newsracks and soda vendors, which attempted to separate the conduct of placing newsracks on public property from the expressive activity of distributing newspapers. *Id.* at 761, 108 S.Ct. at 2146. The real parallel, the Court opined, is between newsracks and leafletters, whose First Amendment rights are well established. *Id.* at 762, 108 S.Ct. at 2146 (citing *Lovell*, 303 U.S. at 447, 58 S.Ct. at 667). Newsstand operators are also businessmen. Yet they cannot be divorced from the substance of their business, which involves critical First Amendment activity, any more than booksellers or publishers distributing newspapers in newsracks. If anything, the analogy drawn in *Lakewood* between newsracks and pamphleteers is even stronger in this case where the vendors distribute publications by hand. It is true, as the dissent points out, that *Lakewood* rejected any distinction based on distribution by hand versus distribution by machine. We do not make any such distinction or grant one method of distribution any more First Amendment protection than the other. It is nevertheless true that the newsstand operator's means of distribution resembles the pamphleteer's method more than does the newsrack. In any event, both forms of distribution receive First Amendment protection. The newsstand, which falls somewhere between the two, must receive protection as well. The dissent says that we have vindicated Justice White's fear in his *Lakewood* dissent that newspaper publishers may seize public property for private use and ignore the governmental interests at

stake. We have done no such thing. We hold only that a municipality must grant its citizens certain procedural safeguards where it seeks to license expressive activity, and we most emphatically reject the notion that private parties have any unassailable right to build structures on public property.

III.

The court below mistakenly held that the city's ordinance is not a prior restraint. Chicago's ordinance forces news vendors to apply for a permit from local officials before they can sell papers from their newsstands. This licensing scheme creates a classic prior restraint by giving administrators the power to foreclose speech. Though not every prior restraint is invalid, the judiciary is vigilant in its oversight of prior restraints because of the fear that they deprive or delay access to information, and because restraints that lack procedural safeguards may lead to content-based discrimination. As the Supreme Court said in *Vance v. Universal Amusement Co., Inc.*:

> Any system of prior restraint * * * "comes to this Court bearing a heavy presumption against its constitutional validity." * * * The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech

> is often so finely drawn that the risks of free-wheeling censorship are formidable.

445 U.S. 308, 316 n. 13, 100 S.Ct. 1156, 1161 n. 13, 63 L.Ed.2d 413 (1980) (citations omitted). The Supreme Court has held in a long line of cases that authority exercised to administer a licensing scheme must be bounded by clear and precise standards where officials have the power to foreclose speech in public places. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448 (1975); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938-939, 22 L.Ed.2d 162 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958); *Kunz v. New York*, 340 U.S. 290, 293-294, 71 S.Ct. 312, 314-315, 95 L.Ed. 280 (1951); *Schneider v. New Jersey*, 308 U.S. 147, 161-162, 60 S.Ct. 146, 160-161, 84 L.Ed. 155 (1939); *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). A prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman*, 380 U.S. at 58, 85 S.Ct. at 739. An ordinance must contain explicit limits on the decisionmaker's discretion. *Lakewood*, 486 U.S. at 769, 108 S.Ct. at 2150. In short, this Court is obligated to scrutinize closely the level of discretion granted to the Chicago official who licenses newsstand operators.

The Supreme Court's 1990 decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, adapted the procedural safeguards of *Freedman*, a motion picture censorship case, to a licensing scheme for sexually oriented businesses. *FW/PBS* instructs us how to evaluate a licensing scheme to ensure that it contains adequate

procedural safeguards. A city may only license a business associated with First Amendment freedoms if, first, the licensor is obligated to grant or deny the permit within a specified and reasonable time during which the status quo is maintained and, second, if there is the possibility of prompt judicial review in the event the license is erroneously denied. *Id.* at 228, 110 S.Ct. at 606. A ministerial action denying a license is not presumptively invalid, unlike most prior restraints, and the city is not required to justify its decision in court on every occasion. *Id.* at 229, 110 S.Ct. at 606-607. However, the vendor denied a license must be able to seek prompt judicial review, and the absence of review is fatal. See *Southeastern Promotions*, 420 U.S. at 561-562, 95 S.Ct. at 1248; *FW/PBS*, 493 U.S. at 229 110 S.Ct. at 606-607.[6]

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[6] The dissent takes issue with our reliance on *FW/PBS* because part of Justice O'Connor's opinion was joined by only two other justices. However, the dissent would rely on a dissent by Justice White, which was joined only by the Chief Justice. This splicing of justices is ultimately unavailing to the dissent's position because three other justices concurred in the judgment and criticized Justice O'Connor's position because the procedural safeguards she prescribed were not strong enough! Even if Justice White's opinion were compelling, which it is not, this Court would not be free to adopt its reasoning. Specifically, Judge Manion criticizes what he calls the "new slant" in Justice O'Connor's opinion in *FW/PBS* that sees judicial review as an independent species of official discretion. Under the dissent's view, based on Justice White's dissent, a court would first have to determine whether municipal officials exercised too much discretion before it could reach the question of judicial review. This scheme however, would render meaningless the requirement of judicial review. Either the court will have already found excessive discretion, in which case there is no need to reach the judicial review question, or the court will not find excessive

The Chicago ordinance does not measure up under the dictates of *FW/PBS* and *Southeastern Promotions*. It does, however, contain some important safeguards. The ordinance guarantees prompt decisions on permit applications: between thirty-five and sixty-five days for initial permits and ten days for renewal permit applications. CHICAGO, ILL.MUN.CODE § 10-28-160(c) (1991). The ordinance also gives the Commissioner of Public Works explicit instructions to grant or deny permits only according to six factors: whether the design comports with the "quality and character of the streetscape"; whether the vendor complies with the ordinance; whether the vendor has previously operated a stand at the location; whether there are other newsstands in the area; how many daily publications will be carried; and whether the size of the stand relates to the number of days it will be operating. CHICAGO, ILL. MUN.CODE § 10-28-160(a)(1)-(6) (1991).

The ordinance's invitation to discriminate by type of publication is troubling. The Commissioner of Public Works is directed to consider "the number of daily publications proposed to be sold from the newspaper stand" as one of six factors in deciding whether to grant a permit. *Id.* While the city might legitimately favor daily publications, it offers no justification for this preference in the record. For all we know, the provision may be an attempt by officials to curry favor with the dailies, generally the most powerful and influential publications in a

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discretion, in which case it is not permitted to reach the judicial review question. This cannot be what *Freedman* and its progeny intended.

city.[7] These rather vague six criteria are in some theoretical sense valid limitations on the exercise of the Commissioner's discretion.[8] However, the Chicago ordinance fails to provide prompt judicial review – or review of any kind for that matter – and so flunks the second requirement of *FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606. The ordinance vests nearly absolute authority in one individual, the Commissioner of Public Works, so long as he is circumspect enough to couch any permit denial in terms of the six criteria. Without the strong check of subsequent review, the ordinance contains merely paper standards; it puts no substantive limits on the decisionmaker's authority. Though at first blush the statute offers elaborate procedural guidelines for the issuance and denial of permits, these are illusory. For example, section 10-28-160(a) outlines procedures for hearings and reports by which a

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[7] The dissent contends that the city has offered several justifications for favoring daily newspapers, and quotes from its brief a statement concerning clutter on the public way. We fail to see, however, why magazines or weekly newspapers should create any more clutter on the public way than dailies.

[8] Section 10-28-191 gives the Commissioner of Public Works "authority to adopt such orders, rules and regulations as he may deem necessary * * * ." This resembles a provision in *Lakewood* to which the Supreme Court took exception, which gave Lakewood's mayor the power to set "such other terms and conditions deemed necessary and reasonable by the Mayor." *Lakewood*, 486 U.S. at 769, 108 S.Ct. at 2150. The Chicago ordinance contrasts favorably because the open-ended clause apparently is restricted by the six criteria of section 10-28-160(a). On the other hand, the language is sufficiently vague on this critical point that, should the City Council resurrect this ordinance, a future court would be forced to dwell on the meaning of this open-ended provision.

City Council committee is to comment on a proposed newsstand license, and it guarantees the vendor the right to be heard in such proceedings. However, these procedures are entirely optional; under the ordinance the City Council could decide not to comment on newsstand applications at all. In fact, the new section 10-28-160 replaces a provision in the older ordinance requiring the full City Council to approve all permits. The new section 10-28-160 instructs the Commissioner of Planning to advise the Commissioner of Public Works, but there is nothing requiring the Public Works Commissioner to accept or even consider his colleague's advice. The only time the Public Works Commissioner shares decision-making authority is when a newsstand vendor seeks a permit to erect a structure on a designated historical landmark. In such cases – including Mr. Graff's application for a stand outside the City of Chicago Cultural Center – the Commission on Chicago Historical and Architectural Landmarks must approve. In all other cases, the Commissioner of Public Works is the sole, unfettered decisionmaker. It is a measure of the leniency of the city's criteria that Mr. Graff's application was ultimately denied even though his stand has operated on approximately the same site for seventy years. Though one of the six criteria in the ordinance is longevity, this did not help Mr. Graff.

The lone reference in the ordinance to subsequent review of the Commissioner's decision is almost laughably inadequate. Under section 10-28-160(c), a vendor whose application is denied has ten days to request a hearing "at which he will be given an opportunity to prove that the determination of the Commissioner was in

error." The ordinance does not define error or specify what proof is required. And the person who reviews the decision by the Commissioner of Public Works is none other than the Commissioner of Public Works! The ordinance merely instructs the Commissioner to issue a permit promptly if he "determines that his previous determination was incorrect." CHICAGO, ILL.MUN. CODE § 10-28-160(c) (1991).

Defendant's supplemental brief attempts to save this glaring absence of subsequent review by noting that a dissatisfied applicant may obtain judicial relief in state court by writ of common law certiorari, or in federal court by way of 42 U.S.C. § 1983. While it is in some sense true that a person denied a license is not precluded from filing suit in state or federal court alleging constitutional deprivation, full-bodied judicial review requires more. In *FW/PBS*, for example, the Supreme Court found that the city ordinance requiring licenses for sexually oriented businesses did not offer sufficient judicial review. 493 U.S. at 229, 110 S.Ct. at 606. Though the ordinance in *FW/PBS* is not reprinted in the Supreme Court's opinion, the plaintiffs in that case also retained a right to file suit in state or federal court – which of course they did – yet this did not satisfy the judicial review requirement. If mere silence on the question of judicial review were sufficient, leaving only the theoretical avenue of redress of claiming a constitutional violation in the courts, then the procedural requirement of *Freedman*, *Southeastern Promotions*, *FW/PBS* and a host of other cases would be redundant or meaningless. The Chicago ordinance does not provide

genuine judicial review, much less the prompt and guaranteed judicial review required of a statute that licenses expressive conduct.

The city goes to great lengths in its papers to assure this Court that it has no intention to put its licensing authority to ill use, urging us, in essence, to relax our standards. Defendant contends, for example, that it could not discriminate on the basis of content because permit applications do not contain a list of what publications a particular newsstand sells (defendant's supplemental brief at 8-9). This is hardly comforting. City officials, were they so inclined, could evacuate their bureaucratic desks for the afternoon, stroll over to a stand and examine for themselves what magazines are sold. Defendant also contends that all newsstands sell all manner of publications, so that there is no danger of content discrimination in the permit process (defendant's supplemental brief at 9). Defendant offers no proof for the proposition that all newsstands sell exactly the same publications, and we rather doubt its accuracy. Indeed, it is not difficult to imagine a city wielding its power to deny a permit to newsstands selling underground papers sharply critical of municipal officials. Or the city could use its licensing scheme to punish vendors who sell pornographic magazines that are otherwise constitutionally protected. The ordinance contains no minimum or maximum limit on the number of permits issued. Thus, were the Commissioner seeking to punish a stand for selling a particular publication, he would not face the obstacle of having to find a replacement vendor.

Plaintiff, having brought a facial challenge, cites no specific instance in which the city has abused its licensing

authority, but a facial challenge requires us to be vigilant in the protection of expressive freedom, and implores us not to assume governmental restraint. As the Supreme Court said in *Lakewood:*

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows.

486 U.S. at 770, 108 S.Ct. at 2150. The dissent accuses us of being picky, of "tak[ing] a microscope to the ordinance * * * ," of giving the city too little guidance, and of not sufficiently appreciating that Chicago "was searching for a reasonable alternative to either prohibiting newsstands entirely or permitting newsstands at will" (at pp. 1079-80). Such criticism misapprehends the role of this Court, particularly in the area of the First Amendment. The judiciary's role is not to act as legislative adviser or to bend backward to accommodate the city's goals. Where a municipality takes up the power to license an activity that involves speech, the burden is on the city, not the speaker. The dissent puts forth the extraordinary proposition that "[o]nly if the government discriminates on the basis of the content of speech should the ordinance be scrutinized under the First Amendment" (at p. 1074). This would essentially eliminate the doctrine of prior restraints. If courts were compelled to wait until the government discriminated on the basis of content, they

would lack the power to review licensing schemes in advance of their application and to require procedural safeguards. This view cannot be correct.

IV.

The district court decision makes much of the city's contention that is licensing scheme is a content-neutral time, place and manner regulation. This may well be, but it is of no import when an ordinance fails to provide adequate procedural safeguards in a licensing scheme directed at First Amendment-protected activity. Such a licensing program is unconstitutional even if it is a content-neutral time, place and manner restriction. *FW/PBS*, 493 U.S. at 223, 110 S.Ct. at 603. In that decision, for example, the Supreme Court held that it needn't reach a Court of Appeals finding that the ordinance at issue was a "content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses" because the procedural safeguards built into the licensing scheme were inadequate. *Id.* Therefore, the district court's lengthy discussion of the content-neutral and time, place and manner aspects of the Chicago ordinance is also irrelevant, and the dissent's suggestion that the case should be remanded to allow the city to present its justifications for censorship is unpersuasive. If an ordinance lacks sufficient procedural safeguards, there is no point in pursuing the time, place and manner analysis. It is worth noting, however, that the district court's discussion of these issues applies the incorrect test.

Mr. Graff's First Amendment activity takes place on a traditional public forum: the sidewalk. *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983). As the Supreme Court recognized in *Hague v. CIO:*

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). Speech in such a traditional public forum as a sidewalk is accorded a special status in constitutional jurisprudence. *Grace*, 461 U.S. at 180, 103 S.Ct. at 1708. In traditional public fora, the government's power to restrict expressive conduct is extremely circumscribed. The government may only enforce reasonable time, place and manner regulations that are content neutral, narrowly tailored to serve a significant governmental interest, and which leave open alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).[9]

Defendant attempts to draw an analogy between this case and our decision in *Lubavitch Chabad House, Inc. v.*

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[9] The government may also enforce a content-based regulation that is necessary to serve a compelling state interest and which is narrowly drawn to achieve that end.

City of Chicago, 917 F.2d 341 (1990), in which we upheld the refusal of officials to permit erection of a Chanukah menorah alongside Christmas trees placed by the city as seasonal decorations at O'Hare International Airport. As the Supreme Court pointed out in its last term, however, an airport is not a traditional public forum merely because the public is freely invited. *International Soc. for Krishna Consciousness v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2706, 120 L.Ed.2d 541 (1992).[10] Unlike an airport, the sidewalks from which Mr. Graff hawks his newspapers and magazines are longstanding public fora on which expressive activity receives special protection. The opinion below did not apply any special scrutiny to the ordinance because it limits speech in a traditional public forum. In fact, the district court's memorandum opinion and order does not so much as mention the phrase "public forum."

Even if the judge had been correct that the city's licensing scheme is not a prior restraint, he would still have erred in not applying the test set forth in *Perry Education Ass'n*. Though he found that the regulation is content neutral, and merely a time, place and manner regulation, he failed to measure either the city's proposed

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[10] The dissent notes correctly that *International Soc. for Krishna Consciousness* was decided after our decision in *Lubavitch Chabad House, Inc.* We are compelled, of course, to read our precedents in light of subsequent Supreme Court opinions. In any event, Lubavitch Chabad House does not address the question of procedural safeguards for licensing speech. The primary holding of the case is that there is no constitutional right to erect structures on public property, a position fully consistent with the Court's decision today.

interests in regulating expressive conduct or the availability of alternative channels of communication. *Perry Education Assn.*, 460 U.S. at 45, 103 S.Ct. at 955. If for no other reason than this, we would be forced to remand.

V.

For the reasons stated above, we hold that the Chicago ordinance violates the First Amendment of the Constitution. Section 10-28-192 of the ordinance is a severance clause intended to rescue the statute should certain portions be found unconstitutional. However, this provision cannot salvage the newsstand ordinance because the statute is doomed by its omissions rather than its excesses. As this case has proceeded, the city has not filed an answer. Because the ordinance is unconstitutional on its face, and that question of law has been fully briefed and argued in this Court, there is no occasion on remand to call for an answer. The dismissal of counts one and two is reversed and the cause is remanded with instructions to enter an injunction prohibiting the city from removing plaintiff's newsstand and from otherwise enforcing the present ordinance against him.

APPENDIX

Relevant portions of the Chicago municipal ordinance governing newsstands are as follows:

10-28-130. It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand on the public way or on any other unenclosed property owned or controlled by the City without obtaining a permit

therefor from the Commissioner of Public Works as hereinafter provided. * * *

10-28-135(b). The Commissioner of Public Works may from time to time reissue all or a portion of those permits that have been revoked or have expired. * * *

10-28-150. Application for a permit for a newspaper stand or for renewal of such permit * * * shall contain * * * the number of daily publications and other publications that will be sold from the stand * * * and a statement that such permit will be accepted subject to the conditions and provisions thereof * * *

10-28-160(a). * * * [T]he Commissioner shall deliver a duplicate of the application to the Commissioner of Planning and to the alderman of the ward in which the newspaper stand is or will be located. Upon receipt of such application, the alderman may refer the application to the City Council's Committee on Transportation and the Public Way for the purpose of conducting public hearings on the proposed permit application. All interested persons, including the applicant, shall be given an opportunity to be heard at such hearings. After conducting such hearings, the Committee may issue a report summarizing the issues that were addressed at the hearings and recommending approval or denial of the application. * * * The Committee's report on the permit application shall be based solely on the following considerations:

> (1) Whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the

streetscape, including nearby development and existing land uses;

(2) whether the newspaper stand complies with this Code;

(3) whether the applicant has previously operated a newspaper stand at that location;

(4) the extent to which services that would be offered by the newspaper stand are already available in the area;

(5) the number of daily publications proposed to be sold from the newspaper stand; and

(6) the size of the stand relative to the number of days the stand will be open and operating.

Any Committee report recommending disapproval of a permit application must state the specific reasons for the recommendation, which reasons shall be consistent with an applicant's constitutional rights contained in the First, Fifth and Fourteenth Amendments of the United States Constitution. * * *

In acting on all applications filed pursuant to this subsection, the Commissioner of Public Works shall give due consideration to the Committee's report, if any, and to the recommendation of the Commissioner of Planning, and shall be bound by the same standards as apply to the Committee in approving or denying a permit.

Notwithstanding any other provision to the contrary, any application under this subsection (a) for a permit for a newspaper stand to be located on property on which a designated landmark is situated, or on the public way between the street and the property line of such property,

shall be subject to permit review by the Commission on Chicago Historical and Architectural Landmarks. * * *

(c) Any action denying or approving a permit application under subsection (a) of this section shall be made by the Commissioner of Public Works not less than 35 and not more than 65 days after the application is filed with the Commissioner. Any action denying or approving a permit application under subsection (b) shall be made by the Commissioner of Public Works within 10 days after the application is filed with the Commissioner. If the Commissioner denies the application, he shall notify the applicant by mail of the reasons for his decision. Within 10 days after notice of denial of an application is sent, the applicant may request a hearing at which he will be given an opportunity to prove that the determination of the Commissioner was in error. The Commissioner of Public Works (in co-operation with the Commissioner of Planning if the denial was based on his determination) shall schedule a hearing to be held within 30 days after he received the request.

If, after the hearing, the Commissioner of Public Works determines that his previous determination was incorrect, the Commissioner shall promptly issue or renew the permit. * * *

(e) [W]hen two or more otherwise equally qualified applications are pending for new newspaper stands that are to be located in any area of the City in which only one new newspaper stand is permitted, preference shall be given to the application for the newspaper stand offering the largest number of different daily publications. * * *

10-28-165(b). * * * Such permit shall remain valid until May 1st of the year following the year in which it is issued and may be renewed as provided in this Article. * * *

10-28-191. The Commissioner of Public Works shall have the authority to adopt such orders, rules and regulations as he may deem necessary for the proper administration and enforcement of the provisions of this Article.
10-28-192. The provisions of sections 10-28-130 through 10-28-192 are severable. If any section, clause, provision, portion or application of those sections is determined by any court to be invalid for any reason, the validity of the remaining sections, clauses, provisions or portions, and their application to other circumstances, shall not be affected thereby. It is the intention of the City Council that those sections would have been enacted by the City Council regardless of the invalid sections, clauses, provisions, portions or applications. . .

MANION, Circuit Judge, dissenting.

In this case the court strikes down the ordinance on its face. I respectfully dissent on three separate and independent grounds. First, the newsstand ordinance does not involve speech under the protections of the First Amendment. Second, a facial challenge is not permitted (Graff should have applied for, and been denied, a permit before filing suit). Third, even if a facial challenge were possible, I would remand for a determination of whether the ordinance contains reasonable time, place and manner restrictions that serve a substantial governmental interest and whether alternative avenues of communication are available.

I. Structure or Speech?

Part IV of the court's opinion holds that a newsstand occupying a sidewalk involves a traditional public forum. I disagree. The newsstands target the general public and may, as in this case, operate on public land. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802-03, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). But the building of a newsstand is not a form of constitutionally protected expression. At least the court appears not to hold that Graff has a constitutional right to build newsstands on public property. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762 n. 7, 108 S.Ct. 2138, 2147 n. 7, 100 L.Ed.2d 771 (1988). Rightly so. There is no

> private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would

> be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.

Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 347 (7th Cir.1990). *Accord Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-15 and n. 32, 104 S.Ct. 2118, 2133-34 and n. 32, 80 L.Ed.2d 772 (1984). The court distinguishes *Lubavitch* on the basis that an airport is not a traditional public forum, citing *International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2706, 120 L.Ed.2d 541 (1992). The *Krishna* case was decided two years after *Lubavitch*. The Seventh Circuit established a direct holding that in a case that involves a public forum, there is no constitutional right to erect structures. *Id.*, 917 F.2d at 347. Unless the structure of a Chanukah menorah deserves less protection than the structure of a newsstand, *Lubavitch* is dispositive of this case. Although a case involving an airport would now receive a different analysis under *Krishna*, the major teachings of *Lubavitch* remain to guide us in cases such as this one.

In *Lakewood* a newspaper challenged a city ordinance that allowed the mayor to grant or deny permits to publishers to place their newsracks on public property. The mayor had to state specific reasons if he denied the application; in granting a permit, the mayor could add such terms and conditions he deemed reasonable and

necessary. The newspaper elected not to apply for a permit, instead bringing a facial challenge to the ordinance. 486 U.S. at 754, 108 S.Ct. at 2142.

> [A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. . . . The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at 759, 108 S.Ct. at 2145. The Court found the First Amendment implicated because the specific ordinance involved newspapers and required them to renew their newsrack licenses annually. The Court saw the printing and circulation of newspapers as "conduct commonly associated with expression" and the periodic licensing scheme as closer to a regulation that allows the government to view actual speech content before issuing a permit.

The court in the present case uses *Lakewood* in holding that "If newsracks receive First Amendment protection, so do newsstands." [p. 1062]. But *Lakewood* does not so conveniently bridge the gap between newsracks and newsstands. Although the court in *Lakewood* rejected Justice White's dissent, which drew an analogy between newsracks and soda vendors, this court goes so far as to see an even stronger analogy between newsstands and soda vendors because the newsstand operators "distribute publications by hand." [p. 1063]. *Lakewood* called this particular point a "meaningless distinction." *Id.* at 762,

108 S.Ct. at 2146. The fact that newsracks do not involve hand distribution makes the need for the First Amendment, "if anything, greater for newsracks than for pamphleteers." *Id.* Thus, the court in this case uses hand distribution to boost a First Amendment analysis under *Lakewood,* contrary to the Supreme Court's statements that hand distribution is less in need of First Amendment protection than publications passively distributed by machines. The proper parallel is in the *Lakewood* opinion itself.

> [A] law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.

Id. at 761, 108 S.Ct. at 2146. The court in this case sees newsstands as similar to newsracks and leafletters. They are significantly different, however. Newsstands are large, permanent-type structures. They are constructed, not placed; they do not walk around. Newsstands are not advocates; rather they supply many and varying editorial opinions. Newsstands to some extent protect vendors from the weather. And they are not easily moved. Newsstands shelter a business operation; they do not merely dispense or hand deliver newspapers. When they need fixing they get repaired, not replaced. Finally, building

and operating a newsstand is conduct, not speech, which the City can lawfully prescribe:

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

Schneider v. State, 308 U.S. 147, 160-61, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939); *accord International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2711, 2717, 120 L.Ed.2d 541 (1992) ("The principal purpose of streets *and sidewalks*, like airports, is to facilitate transportation, not public discourse." (emphasis added)). While the Supreme Court holds that newsracks involve activity commonly

associated with expression, such as the circulation of newspapers, the First Amendment does not go so far as to give newsstands and similar structures the same treatment.

> While there is a First Amendment right to publish newspapers, publishers have no right to force municipalities to turn over public property for the construction of a printing facility. There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a book seller to construct a book shop – even a small one – on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted. Preventing the "taking" of public property for these purposes does not abridge First Amendment freedoms.

Lakewood, 486 U.S. at 780, 108 S.Ct. at 2156 (White, J., dissenting). The newsstand is more analogous to the construction of a printing facility, book shop or booth, than to a newsboy or newsrack.[1] Although newsstands do

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[1] In *Lakewood*, 486 U.S. at 781-82, 108 S.Ct. at 2157-58, Justice White feared that equating newsracks with newsboys and conduct commonly associated with expression allows newspaper publishers the right to take public property for private use and ignores the governmental interests at stake: allowing all members of the public use of their streets and sidewalks, insuring the public's safety and aesthetic interests, especially where alternative methods of newspaper distribution are available. The court responds that "The physical nature of the structure does not dictate the First Amendment protection it receives because the newsstand or newsrack is merely the conduit." *Supra*, p. 1063. This extension of the rule makes no allowance for the degree the public is obstructed in walking on their

contribute to newspaper circulation, the method of that circulation sufficiently distinguishes newsstands from newsracks as to require distinct treatment.[2] This case neither concerns simply the circulation and printing of newspapers nor "conduct commonly associated with expression." This case involves a structure, a topic within the domain of city ordinances since the very first city council convened.

II. Facial or As-Applied Attack?

Even assuming that newsstands somehow equate with speech, the second hurdle is whether a facial challenge is permitted. Courts are reluctant to entertain facial attacks, where the statute may be declared unconstitutional in all instances. The usual approach is to wait until a statute is applied in the suspected and offensive way. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596, 603, 107 L.Ed.2d 603 (1990); *Lakewood*, 486 U.S. at 774-75, 108 S.Ct. at 2153 (White, J., dissenting). In this case the court holds that a facial challenge is permitted for two reasons: the ordinance requires periodic license renewal and the licensing system is "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." [p. 1061],

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sidewalks. If the ordinance in the present case is struck down, Justice White's fears in 1988 have become Chicago's reality in 1993.

[2] In *Lakewood* the newspaper publisher argued that it was not seeking to rent or permanently build a structure on the sidewalk; the newsrack was characterized as similar to a newsboy, and the newsrack his "mechancal cousin." *Id.* at 778 n. 6, at 2155 n. 6.

citing Lakewood, 486 U.S. 750, 760, 108 S.Ct. 2138, 2145, 100 L.Ed.2d 771. Such a test would allow facial challenges in almost every First Amendment case. Contrary to the court's citation, *Lakewood* used these reasons to address whether newsracks implicated speech, as that term is used under the protections of the First Amendment. In addition to finding that newsracks involve "speech", *Lakewood* holds that:

> when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.

Id. at 755-56, 108 S.Ct. at 2143 (citations omitted). Since we are here assuming for the sake of argument that a newsstand represents "expressive activity," the key inquiry is whether the licensor's discretion is unbridled because "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* There are two reasons for this inquiry. First, only if the licensor's discretion is limited will potential applicants not be intimidated into censoring their own speech by not applying for a license. Second, the lack of express standards makes the plaintiff's burden of proof and judicial review of a licensing decision difficult on the question of whether the decisionmaker had really disfavored certain speech, *id.* at 758, 108 S.Ct. at 2144, or was otherwise unconstitutionally motivated. *Id.* at 759, 108 S.Ct. at 2145. At a minimum, *Lakewood* excused the newspaper from applying for a newsrack permit and allowed a facial

challenge to the ordinance because the ordinance involved expressive activity; the opinion can also be read to inquire into the extent that the licensor's unbridled discretion threatens to censor speech before allowing a facial challenge.

Whether the ordinance was attacked on its face or as applied, a major premise in *Lakewood* is that "the Constitution requires that the City establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *Id.* at 760, 108 S.Ct. at 2145. The Court struck down the ordinance specifically because there were "no explicit limits on the Mayor's discretion." *Id.* at 769, 108 S.Ct. at 2150. In denying a permit application, the Mayor was required only to state "it is not in the public interest." Although the ordinance required the Mayor to state his reasons, the Court found troubling the lack of specificity required and the limitless reasons the Mayor could assert. *Id.* at 771, 108 S.Ct. at 2151. In granting a permit, the Mayor could require the newsrack to be located "in an inaccessible location without providing any explanation whatsoever." *Id.* at 769, 108 S.Ct. at 2151. This constituted "unfettered discretion" abridging the First Amendment. *See FW/PBS*, 493 U.S. at 223, 110 S.Ct. at 603; *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965) ("one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion"); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940) (the offending statute subjected the defendant to "harsh and discriminatory enforcement by local prosecuting officals"). In the context of whether to permit a facial challenge, the court in this

case does not address the question of unfettered discretion.[3] I would hold that the ordinance does not give the Commissioner unfettered discretion.

The ordinance provides for prompt decisions on initial and renewal permit applications, and lists six criteria by which the Commissioner may grant or deny permission to build a newsstand. As the court suggests, many of the criteria do not censor a newsstand operator, including such factors as

> whether the design [of the newsstand] comports with the "quality and character of the streetscape"; whether the vendor complies with the ordinance; whether the vendor has previously operated a stand at the location; whether there are other newsstands in the area, . . . and whether the size of the stand relates to the number of days it will be operating.

[pp. 1064-65]. By requiring the Commissioner to consider these factors, his discretion is limited, not unbridled. A person cannot feel intimidated into censoring his speech just because he would otherwise build a newsstand that blocks another business's display window, disregard paying any permit fee, or build a newsstand as a start-up business next door to another one, only to be open one day a week. Obviously, no two newsstand can occupy the same spot at the same time. These criteria give adequate

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[3] The court does address unfettered discretion in the context of whether the ordinance contains sufficient judicial review provisions, wherein the court is willing to assume for the sake of argument that the ordinance contains valid limitations on the Commissioner's discretion. [p. 1065]

and specific guidance to the Commissioner, and predictable reasons to the applicant, as to why a particular permit to build a newsstand should be preferred. If a permit to build a newsstand were denied, these express standards give the plaintiff adequate guidance in challenging the application of the ordinance to his particular case, and upon judicial review allows an informed inquiry into whether the Commissioner made his decision in an unconstitutional manner, such as by disfavoring certain speech. The factors outlined in the ordinance are subjective and involve a weighing of interests. By denying and granting more and more permits, the Commissioner's subjective decisions and weighing of interests can be held to a consistency standard; if the plaintiff is denied a permit, yet a similar (or a less satisfactory) distributor is granted a permit under like circumstances, the ordinance gives the plaintiff a road map in how to prove whether the Commissioner denied a permit for reasons unconstitutional.

This court finds troubling the Commissioner's ability to consider how may daily publications the newsstand will carry. [p. 1065]. This factor does not infringe, but rather fosters, the interests of the First Amendment that Graff challenges. *See Gannett Satellite Info. Net. v. Metro Transp. A.*, 745 F.2d 767, 774 (2d Cir.1984) ("the newspapers are in a privileged position and are not and will not become the victims of discrimination"). The ordinance clearly favors an applicant who has the higher, not the lower, proposed number of publications to be sold from the newsstand. This conceivably censors only the newsstand operator who himself might censor certain publications from distribution. In addition, an ordinance

directed at the number of publications concerns quantity, not quality. Graff cites no case where an ordinance promoting speech (in general) infringes the First Amendment. Only if the government discriminates on the basis of the content of speech should the ordinance be scrutinized under the First Amendment.

The ordinance addresses the speech content in two ways. First, the ordinance favors the newsstand that will carry more *daily* publications. Second, the ordinance permits the newsstand to carry only "newspapers, periodicals and similar publications." Chicago, Ill.Mun.Code § 10-28-180) (1991). The court concludes that these provisions may be an attempt to "curry favor with the dailies." The City readily admits that the "intended function" of the ordinance "is merely a preference for newsstands that maximize the number of newspapers sold." The court also states that "While the city might legitimately favor daily publications, it offers no justification for this preference in the record." [p. 1065]. The City can and does offer legitimate reasons to favor daily publications.

The district court granted the City's motion to dismiss two of three counts in the complaint. The district court has denied injunctive relief because of an insufficient likelihood of success on the merits. With this ruling there was never any need for the City to present any justification for its ordinance, especially in light of Graff presenting a facial challenge. On appeal, the City offers a variety of legitimate reasons to favor the dailies.

> [R]estrictions on what can be sold have nothing to do with the viewpoint expressed in the items sold from newsstands. They are simply an effort to reduce clutter on the public way. . . . This

> type of ordinance, designed to facilitate the distribution of newspapers from a newsstand without undue obstruction of the public ways, is viewpoint neutral.[4]

As a practical matter, people purchase newspapers in seconds. The more time-consuming purchase of books or video-tapes, in contrast, would obviously obstruct the public way. The only reason that a factual record might prove necessary is if the preference for daily newspapers and the restriction against books or videotapes qualifies as an unwarranted infringement of speech. As I discuss in Part III, *infra*, I would leave for the district court on remand the question of whether "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 191 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989). It seems that the book-videotape dispute is an excuse to magnify a First Amendment issue. At the very most this isolated factor can be severed from an otherwise valid ordinance.

The court reverses the district court for one reason: that the "ordinance fails to provide prompt judicial

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[4] The City also argued in the district court that prior Supreme Court decisions allow the City to

> provide more outlets for the sale of daily publications than for the sale of other "expressive materials." *See, e.g., Lakewood* [486 U.S. at 771-72, 108 S.Ct. at 2152], 100 L.Ed.2d at 792 (uniqueness of daily newspapers requires public access at a particular time); *Gannett Satellite Inf. Net v. Metro Transp. A.*, 745 F.2d 767, 773-4 (2d Cir.1984) (upholding as content neutral regulation which allowed newspapers but not other vendors to install coin operated vending machines).

review – or review of any kind for that matter – and so flunks the second requirement of *FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606." [p. 1065]. The court's entire opinion relies on *FW/PBS*.

In *FW/PBS* the city of Dallas attempted to curb the secondary effects of crime and urban blight by regulating the activities of sexually oriented businesses. 493 U.S. at 220, 110 S.Ct. at 602. The ordinance subjected these businesses to "zoning, licensing, and inspections." *Id.* at 220-21, 110 S.Ct. at 602. Part II of Justice O'Connor's plurality (three Justices) opinion, specifically relied upon by the court in this case, presented two holdings: (1) "petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest," *id.* at 225, 110 S.Ct. at 604; and (2) the failure to "provide for an effective limitation on the time within which the licensor's decision must be made" and the failure to "provide an avenue for prompt judicial review so as to minimize suppression of the speech" renders the ordinance unconstitutional, (two of three procedural safeguards recited in *Freedman*). *FW/PBS*, 493 U.S. at 229, 110 S.Ct. at 606.[5] Only two other Justices (Stevens & Kennedy) joined in these holdings. Justice Brennan, joined by

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[5] Justice Brennan summarized the three *Freedman* safeguards as follows:

> (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor

Justices Marshall and Blackmun concurred only in the judgment. They would have added to the second holding a requirement that the government "bear both the burden of going to court and the burden of proof in court" (the third *Freedman* safeguard). *FW/PBS*, 493 U.S. at 239, 110 S.Ct. at 612. Thus, *FW/PBS* certainly narrowed the *Freedman* doctrine; where a licensing scheme requires "adult" business to procure a license before engaging in business, only two of the three procedural requirements survived. *FW/PBS*, 493 U.S. at 229-30, 110 S.Ct. at 608-09. Justice Scalia, dissenting, rejected the first holding, arguing to not allow a facial attack on the ordinance. *Id.* at 262, 110 S.Ct. at 624. Justice White, joined by Chief Justice Rehnquist, also dissented and rejected the second holding that the ordinance had to include the *Freedman* safeguards. *Id.* at 244, 110 S.Ct. at 614.

In *FW/PBS*, the city did not contest that the businesses challenging the ordinance had "a valid First Amendment interest." *Id.* at 225, 110 S.Ct. at 604. The city did not argue that the ordinance did not raise First Amendment concerns. *Id.* at 224, 110 S.Ct. at 604. Even though the ordinance involved an inspection scheme that applied to all businesses, the Court found that the ordinance "largely targets businesses purveying sexually explicit speech which the city concedes . . . are protected by the First Amendment," *id.*, and that "the scheme involved here is more onerous with respect to sexually

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must bear both the burden of going to court and the burden of proof in court.

FW/PBS, 493 U.S. at 239, 110 S.Ct. at 612.

oriented businesses than with respect to the vast majority of other businesses." *Id.* at 225, 110 S.Ct. at 604.

In the present case the City of Chicago disputes that the First Amendment protects the construction of newsstands. This case neither concerns simply the distribution of newspapers nor conduct commonly associated with expression. Nor is the ordinance more unreasonably burdensome with respect to newspaper distributors as compared to other businesses. The primary reason I reject a facial challenge to the ordinance is because a newsstand is a structure, not speech. This case thus involves contested conclusions that *FW/PBS* assumed were admitted. Thus, *FW/PBS* is not controlling because the Supreme Court did not address to what extent the judicial safeguards in *Freedman* should apply in cases even tangentially involving First Amendment protection.

The second reason I oppose a facial challenge (the Commissioner's lack of unbridled discretion in the ordinance) directly involves the *FW/PBS* case. Justice O'Connor addresses whether the Dallas ordinance involves unbridled discretion and the lack of judicial review in two entirely different contexts: First, whether the ordinance is susceptible to a facial challenge. *Id.* at 223-25, 110 S.Ct. at 603-04. Second, whether the ordinance is unconstitutional as a prior restraint on speech. *Id.* at 225-29, 110 S.Ct. at 604-06.

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975), and *Freedman*, 380 U.S. at 58, 85 S.Ct. at 739, the Supreme Court held that a system of prior restraint offends the Constitution if it lacks certain safeguards, including

prompt judicial review. But in both cases, before the Supreme Court addressed the issue of a lack of judicial review, the prerequisite finding was that the government officials had too much discretion. *Southeastern*, 420 U.S. at 553, 95 S.Ct. at 1244 ("unbridled discretion"); *Freedman*, 380 U.S. at 56, 85 S.Ct. at 737 ("overly broad licensing discretion"). *Accord Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969) (the ordinance gave the city commission "virtually unbridled and absolute power to prohibit" certain speech); *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1957) ("uncontrolled discretion"); *Kunz v. New York*, 340 U.S. 290, 293, 71 S.Ct. 312, 314, 95 L.Ed.280 (1951) (discretion based upon the police commissioner's personal interpretation at a given time). *Cf.*, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 786-87, 793-94, 108 S.Ct. 2667, 2672, 2676, 101 L.Ed.2d 669 (1988) (the government had left the standard of reasonableness of a fundraiser's fee to a case by case judicial standard). In *FW/PBS*, however, Justice O'Connor seemed not to confine these cases, or *Freedman* specifically, to cases where the Supreme Court made a prerequisite finding that the government officials had too much discretion before considering whether judicial review was available. Rather Justice O'Connor asserted a new slant on our inquiry:

> In *Freedman*, we held that the failure to place limitations on the time within which a censorship board decisionmaker must make a determination of obscenity is a species of unbridled discretion. See *Freedman*, [380 U.S.] at 56-57 [85 S.Ct. at 737-38] (failure to confine time within which censor must make decision "contains the

> same vice as a statute delegating excessive administrative discretion"). Thus, where a scheme creates a "[r]isk of delay," 380 U.S. at 55 [85 S.Ct. at 737], such that "every application of the statute create[s] an impermissible risk of suppression of ideas," *Taxpayers for Vincent*, [466 U.S.] at 798 n. 15 [104 S.Ct. at 2125 n. 15], we have permitted parties to bring facial challenges.

FW/PBS, 493 U.S. at 223-24, 110 S.Ct. at 603-04. What is puzzling is that although the Dallas ordinance on its face did not contain any of the *Freedman* limitations, *id.* at 227, 110 S.Ct. at 605-06, the only reasons advanced by the Court in allowing a facial challenge were those stated earlier: the Court found that the ordinance "largely targets businesses purveying sexually explicit speech which the city concedes . . . are protected by the First Amendment," *id.* at 224, 110 S.Ct. at 604, and that "the scheme involved here is more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses." *Id.* at 225, 110 S.Ct. at 604. In holding that a facial challenge was permitted, the Court felt it unnecessary to address whether the ordinance gave the decisionmaker unbridled discretion or contained inadequate procedural limitations. On this point the City of Dallas' admissions were fatal. In the present case, however, the City of Chicago concedes nothing; therefore, I will briefly address what I perceive as the Supreme court's new slant (announced but not applied) on allowing facial challenges in the First Amendment arena.

Justice White, dissenting in *FW/PBS*, argues that *Freedman's* procedural safeguards were designed to "protect against arbitrary use of the discretion conferred by

the ordinance." *Id.* at 246, 110 S.Ct. at 616. Justice O'Connor, however, sees the lack of procedural safeguards as "a species of unbridled discretion." *FW/PBS*, 493 U.S. at 223-24, 110 S.Ct. at 603-04. It is not clear exactly what Justice O'Connor means by this statement because the *FW/PBS* case sidestepped the issue of whether the lack of procedural safeguards allows a facial challenge, relying rather on the city's admissions. The key distinction between Justice White's and Justice O'Connor's approaches rests on a fundamental disagreement over facial verses as-applied challenges.

The Supreme Court continues to disfavor facial challenges. *FW/PBS*, 493 U.S. at 223, 110 S.Ct. at 603. Justice White, dissenting in *Lakewood*, objected to allowing a facial challenge where an ordinance granted discretion to a government official because it presumes that such discretion would be illegally exercised. *Id.*, 486 U.S. at 776, 108 S.Ct. at 2154. Rather than await whether a government official actually exercised his discretion unlawfully (an as-applied challenge), the Supreme Court would allow a facial challenge "whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759, 108 S.Ct. at 2145. It is one thing to conclude that censorship occurs where the government could use its power unlawfully under an ordinance involving unbridled discretion; it is quite another, as the court in this case holds, to conclude that a person would feel censored where the government's discretion is limited,

yet that discretion is not subject to certain procedural safeguards.[6]

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[6] The court reads *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir.1991), as "merely regulat[ing] the size of newsracks; it did not exercise licensing power to deny permit applicants the means to conduct business related to the First Amendment." [page 1062 n. 5]. I disagree. In *Chicago Observer*, the City of Chicago enacted an ordinance "designed to get the Observer's billboards off the sidewalks," and addressed the size and advertisements concerning newsracks. 929 F.2d at 327. The district court enjoined the City from removing any newsracks because the owners were not given an opportunity for a hearing prior to removal. After the City amended the ordinance to provide for notice and a hearing, the district court refused to vacate the injunction on the grounds that the Commissioner had unfettered discretion to later revoke the amendment. *Id.* We reversed, upholding the ordinance because the City "offers hearing before a neutral arbiter, the right to be represented by counsel, to present evidence, to cross-examine adverse witnesses." *Id.* at 328.

If the ordinance originally did not provide for notice and hearing procedures, it obviously did not provide the procedural safeguards articulated in *Freedman* or, as this court now asserts, in *FW/PBS*. We simply noted that The Chicago Observer did not seek review in state court. *Id.* at 327. And we did reach some of Chicago Observer's constitutional arguments stating that Chicago does not regulate the viewpoint of publications; it is concerned only with size and advertising." *Id.* The parties do not dispute that the ordinance in this case gives proper notice and an opportunity for a hearing. The court only complains that the Commissioner's ultimate decision is not limited by the *Freedman* standards. The court's holding in this case seems to condemn the ordinance we approved in *Chicago Observer*. This would be contrary to the court's assertion that the case is not relevant here.

The Supreme Court has not addressed this point directly. Justice O'Connor's opinion that procedural safeguards are a "species" of unbridled discretion does not say that censorship is more likely to occur when there is a lack of procedural safeguards and yet the ordinance otherwise limits a decisionmaker's discretion. It is naive to think that a person lacks a judicial forum when their speech is allegedly infringed. Neither Graff nor the City of Chicago argues that the judiciary cannot hear challenges to this ordinance because of the lack of judicial permission in the ordinance. The lack of these procedural safeguards does not censor speech, where these procedural safeguards, in a practical sense, neither expand nor detract from our jurisdiction over constitutional questions. The Illinois state courts also maintain jurisdiction over the Commissioner's decision through the writ of common law certiorari. *See Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill.2d 413, 141 Ill.Dec. 453, 458, 551 N.E.2d 640, 645 (1990). *Lakewood* favored a facial attack because the lack of express standards would make judicial review, and the plaintiff's burden of proof, difficult on the question of whether the decisionmaker had disfavored certain speech, or was unconstitutionally motivated. *Id.*, 486 U.S. at 757-58, 108 S.Ct. at 2144-45. *Freedman* favored a facial attack because awaiting the censor's exercise of discretion and bringing an as-applied challenge to the ordinance "may be too little and too late." *Id.*, 380 U.S. at 57, 85 S.Ct. at 738. Such reasons for a facial attack concerning judicial review are not present in this case.[7]

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[7] In *FW/PBS*, a plurality (JJ. O'Connor, Stevens and Kennedy) applied only two of the three procedural safeguards in

The ordinance's express standards give adequate and specific guidance to the Commissioner, and predictable reasons to the applicant, as to why a particular permit to build a newsstand should be preferred. If a permit to build the newsstand were denied, these express standards give the plaintiff adequate guidance in challenging the application of the ordinance to his particular case, and upon judicial review allows an informed inquiry into whether the Commissioner made his decision in an unconstitutional manner, such as by disfavoring certain speech. If Graff were ultimately denied a permit under the ordinance, he could only feel censored by the application of the ordinance's criteria to his particular situation, not because the ordinance does not contain specific procedural safeguards. Such judicial review would also not come "too little and too late." Graff does not argue that the City of Chicago cannot ban newsstands entirely. And he cannot seriously argue that he has a constitutional

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Freedman to a licensing scheme involving sexually oriented businesses. *Id.* 493 U.S. at 229-30, 110 S.Ct. at 606-07. Justices White, Scalia, and Chief Justice Rehnquist did not apply the *Freedman* safeguards. And Justices Brennan, Marshall and Blackmun would have applied all three of the *Freedman* safeguards. In the present case, by simply citing to *FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606, as authority for its holding, the court disregards the fact that Justice O'Connor at least considered the nature of the speech and the discretion in the ordinance as relevant inquiries regarding the extent the *Freedman* safeguards are necessary. If the full procedural protections of *Freedman* are not necessary in the context of sexually oriented licensing schemes, *FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606, what law demands that the *Freedman* safeguards are necessary in an ordinance that regulates the building of newsstands on public property?

right to erect a newsstand on public property anywhere he desires.

A facial challenge should not be permitted in the present case for either of two reasons. Newsstands involve the building of structures. Thus, the ordinance does not have "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Lakewood*, 486 U.S. at 759, 108 S.Ct. at 2145. In the alternative, the ordinance does not vest the Commissioner with unbridled discretion so as to censor Graff's speech. I would therefore dismiss Graff's complaint to the extent that it alleges only a facial challenge to the ordinance.[8]

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[8] The importance of an as-applied challenge is particularly appropriate in this case. Graff has insisted on operating his newsstand on property protected by the Commission on Chicago Historical and Architectural Landmarks. After Graff's first amended complaint of September 11, 1991, and the district court's decision of May 28, 1992, the Landmark Commission denied Graff's application on August 13, 1992, concerning a permit to build a newsstand on property that is part of the Chicago Public Library Cultural Center. Graff does not challenge the Landmark Commission's actions as violative of the First Amendment. Thus, if Graff wishes to build his newsstand only where a permit is necessary from the Landmark Commission, he should have no standing to challenge any ordinance that gives the Commissioner of Public Works the power to subsequently act on the permit. Neither the parties nor the district court addressed the matter in detail; I mention it only to illustrate that a facial challenge to the ordinance Graff attacks may still not allow Graff to maintain his newsstand on Landmark property.

III. A Facial Challenge Should Be Remanded

In many ways this case resembles *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). There the city of Renton, Washington enacted a zoning ordinance to prohibit adult motion picture theaters from locating within a certain distance from residential, church, or school property. *Id.* at 43, 106 S.Ct. at 926. The Supreme Court found that the ordinance

> does not appear to fit neatly into either the "content-based" or the "content-neutral category." To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the district court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community.

Id. at 47, 106 S.Ct. at 929. The Supreme Court analyzed the ordinance by looking at the time, place, and manner restrictions in the regulation. The Supreme Court held that the Renton ordinance was justified without reference to content, thus "content-neutral," *id.*, and served a substantial government interest, while allowing for reasonable alternatives of communication. *Id.* at 53-54, 106 S.Ct. at 932. If a city can restrict speech through the planning, regulation, and zoning of property because of the secondary effects of adult motion pictures on the neighborhood, *id.* at 51-52, 106 S.Ct. at 931, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310 (1976), the City of Chicago should be allowed to regulate newsstands, if for only aesthetic reasons. *See*

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984).

In light of the procedural posture of the present case, what the court holds today is unprecedented. Graff filed a complaint for damages and injunctive relief. Rather than conduct a preliminary hearing, the district court denied injunctive relief by granting the defendant's motion to dismiss two of three counts in the complaint. By reversing the district court and holding, as a matter of law, that the ordinance is invalid on its face, the defendants lose without having even answered the first amended complaint.

If the matter were indeed properly remanded, rather than reversed, we could direct the district court to wait until the summary judgment stage of the litigation to address the ultimate question of whether the ordinance should stand. In *FW/PBS*, 493 U.S. at 221, 110 S.Ct. at 602, *Renton*, 475 U.S. at 41, 106 S.Ct. at 925, *Vincent*, 466 U.S. at 792-93, 104 S.Ct. at 2122, and *Young*, 427 U.S. at 55, 96 S.Ct. at 2445, the cities were at least allowed to get to the summary judgment stage. The City of Chicago should at least be given the opportunity to show the substantial governmental interests at stake, the reasonableness of the ordinance's time, place, and manner restrictions and the alternative avenues of communication available to Graff. Only after such an inquiry should we address the extent to which the *Freedman* safeguards are necessary. The court criticizes the district court for failing to "measure either the city's proposed interests in regulating expressive conduct or the availability of alternative channels of communication." [p. 1068]. Even if the district court had attempted to do so, ruling on a motion to dismiss is no

place for such an inquiry. In this case, however, this court goes in the opposite direction and strikes down an ordinance on nothing more than the allegations in a complaint.

IV. Conclusion

Graff filed his original complaint on February 20, 1991. The City of Chicago thereafter amended its newsstand ordinance on June 28, 1991. The City was searching for a reasonable alternative to either prohibiting newsstands entirely or permitting newsstands at will. Today's decision takes a microscope to the ordinance and concludes that newsstands, *per se*, involve speech, and that newsstand ordinances must have a one-sentence section that gives an unidentified court or other reviewing body power to review a Commissioner's decision. The extent to which this judicial review must comply with all of the *Freedman* safeguards we do not know. It could take the City of Chicago only one meeting to correct the technicality the court finds problematic. But the court does little in giving the City any clue to other possible weaknesses in the ordinance. The court holds "that a municipality must grant its citizens certain procedural safeguards where it seeks to license expressive activity." *Supra*, p. 1063. But the ordinance the court strikes down today purports to allow newsstands only when a permit is granted. Since the court "most emphatically reject[s] the notion that private parties have any unassailable right to build structures on public property," (*supra*, p. 1063), by what right does Graff operate his newsstand on public (Landmark) property? Without answers to these questions, the case will probably start over, giving the parties

another two years of litigation expense before we hear it again. This type of strident, piecemeal review neither promotes the interests of the First Amendment nor the needs of the parties in resolving this case.

I respectfully dissent.

A True Copy:

Teste:

_____

Clerk of the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD GRAFF,	)	
Plaintiff,	)	
-vs-	)	No. 91 C 1056
CITY OF CHICAGO, an Illinois municipal corporation, RICHARD M. DALEY, Mayor of the City of Chicago,	)	JUDGE GEORGE W. LINDBERG
	)	[Docketed June 1, 1992]
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Richard Graff, filed a first amended complaint alleging claims against defendants, City of Chicago and Mayor Richard M. Daley, arising out of defendant City of Chicago's ordinances, both new and old, regulating newsstands. Specifically, Count I alleges that the new ordinance is an unconstitutional prior restraint on speech; Count II alleges that the new ordinance denies equal protection of the laws; and Count III alleges that the old ordinance denied plaintiff equal protection of the laws.

Plaintiff has filed an emergency motion for a temporary restraining order requesting that this court "enter an order temporarily restraining and temporarily enjoining Defendants from enforcing the removal provision of the [new] ordinance pending resolution of this action." Because ruling on this motion requires a consideration of the likelihood of plaintiff's being successful on the merits of portions of the first amended complaint, the issues

before the court on this motion are inextricably intertwined with issues raised by defendants' previously filed and briefed motion to dismiss plaintiff's first amended complaint. Therefore, the court will first consider defendant's motion to dismiss.

Although in Count I plaintiff purports to challenge the constitutionality of the new ordinance both on its face and as applied, it is apparent in reviewing the specific defects alleged that plaintiff is only challenging the facial validity of the new ordinance in Count I. Moreover, from the documents concerning the motion for a temporary restraining order, it can be discerned that plaintiff has not applied for and been denied a permit under the new ordinance, so a challenge to the ordinance as applied to plaintiff would not lie at this time.

Certain principles then govern this challenge:

> [W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. . . .
>
> At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. . . .
>
> . . . .
>
> [W]e have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers

> in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.
>
> . . . .
>
> Of course, the city may require periodic licensing, and have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.

City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 756-58, 760-61, 108 S Ct 2138, 2143-46, 100 L Ed 2d 771 (1988). The city's new ordinance is not subject to a facial challenge on first amendment grounds. *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 756-58, 760-61, 108 S Ct 2138, 2143-46, 100 L Ed 2d 771 (1988).

Plaintiff argues that the new ordinance is not content-neutral because it provides that "[a] newspaper stand shall be used for no purpose other than the exhibition and sale of newspapers, periodicals and similar publications." This is a restriction on the use of a newspaper stand that is based upon the type of merchandise sold, and not the content of the expression contained in or embodied by the type of merchandise sold. In other words, the content of the items permitted to be sold may be similar or even identical to the content of the items not permitted to be sold. This provision moreover does not preclude items not permitted to be sold in newsstands from being sold by other merchants with other sorts of businesses. In short, the provision challenged is content-neutral.

Plaintiff also contends the new ordinance's size limitation is a content-based restriction on speech because:

> By limiting the size of a stand, the City limits the number of publications that may be sold. This requires the operator to chose [sic] the types of publications that may be sold. When the size limitation is coupled with the limitation on the type of materials that may be sold and, particularly, the preference for daily publications contained in the ordinance, it will require the operator to prefer and select certain types of speech over others.

Contrary to plaintiff's claim, this does not pose "precisely the risk of self-censorship found unacceptable by the Court in *City of Lakewood*." It does not because the pressure leading to the selection is not pressure to select items expressive of certain views; rather, it is a requirement to

select a limited number of items of the type permitted by the ordinance due to the limited space permitted to a newsstand. In other words, while the ordinance may force a newsstand operator to pick and choose among items in the possible universe of items the newsstand could stock, the ordinance does not in any way pressure a newsstand operator to carry or not carry items having a particular content.

Plaintiff contends that even if the new ordinance is content-neutral, defendants have failed to establish that it is a reasonable time, place, and manner restriction. Plaintiff contends that the sole interest asserted is "the accommodation of multiple uses of the public way and public safety." Plaintiff further contends that "There is no showing that the arbitrary limitation on the number of permits issued to those extant and the size limitations are narrowly tailored to serve those interests." It must of course be recognized that there is only so much room on even the roomiest of public ways, and that the more of it is taken up by newsstands the less of it is available for other uses. Thus, number and size limitations on newsstands appear ideally suited to serve the interests asserted.

Plaintiff contends that:

> The ordinance caps the number of permits at an arbitrary and, at this stage of the litigation, unknown number. It requires any person wishing to operate a newsstand to apply for such permits as may be available. The ordinance vests complete discretion in the Commissioner of Public Works to issue all or none of the existing permits and does not contain any standards

> regarding how a determination is to be made whether and how many permits to issue.

The ordinance provides:

> No new permit for a newspaper stand shall be issued on or after the effective date of this ordinance; provided that permits that have expired or have been revoked may be reissued as provided in this Article.

Municipal Code of Chicago, Ill, § 10-28-130. In addition, the ordinance provides:

> [A]ll newspaper stand permits issued prior to the effective date of this section shall expire on January 1, 1992; provided that any such permit for which no newspaper stand is in existence on the effective date of this section shall expire on such effective date. Such permits may not be renewed but may be reissued by the Commissioner as provided in this Article.

Municipal Code of Chicago, Ill, § 10-28-135(a). Finally:

> The Commissioner of Public Works may from time to time reissue all or a portion of those permits that have been revoked.

Municipal Code of Chicago, Ill, § 10-28-135(a). Plaintiff is correct that the ordinance contains no standards governing the exercise of the discretion to determine the number of newspaper stand permits issued by the Commissioner of Public Works. The combined effect of the provisions quoted and the lack of standards regarding the number of permits to be issued is to vest unfettered discretion over the number of permits in the Commissioner of Public Works.

However, this unfettered discretion is insufficient to support a facial challenge of the ordinance. When reissuing permits, the Commissioner of Public Works is required to:

> [A]dvertise in a newspaper of general circulation within the City the availability of such permits at least 10 days prior to accepting applications for the permits.

Municipal Code of Chicago, Ill, § 10-28-135(b). The ordinance states in detail how the Commissioner is to consider such applications. It includes provisions concerning time limits for consideration of the applications; recommendations (and procedures governing the making of recommendations) by the City Council and other Departments of the City of Chicago; explicit standards governing those making recommendations; and, crucially, explicit standards governing the Commissioner of Public Works in approving or denying a permit. See Municipal Code of Chicago, Ill, §§ 10-28-150, 10-28-160.

Thus, the only area in which the Commissioner had unfettered discretion is in determining how many permits to issue. Thereafter, the Commissioner's discretion is governed by content-neutral standards. This ordinance does not threaten:

> [S]elf-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards to measure the licensor's action.

City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988). As the

ordinance does not "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," it is not subject to a facial challenge on First Amendment grounds. *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988).

Plaintiff also claims that "the standards are fatally vague as they call upon the Commissioner to make subjective aesthetic judgments about whether the newsstand fits in with its surroundings." The standards established by the ordinance are:

> (1) [W]hether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;
>
> (2) whether the newspaper stand complies with this Code;
>
> (3) whether the applicant has previously operated a newspaper stand at that location;
>
> (4) the extent to which services that would be offered by the newspaper stand are already available in the area;
>
> (5) the number of daily publications proposed to be sold from the newspaper stand; and
>
> (6) the size of the stand relative to the number of days the stand will be open and operating.

Municipal Code of Chicago, Ill, § 10-28-160(a). Plaintiff is challenging here the first of these standards. That standard, though involving aesthetic considerations, does not make the ordinance facially invalid. See *Chicago Observer, Inc. v City of Chicago*, 929 F2d 325, 328 (7th Cir 1991) (in reversing a temporary restraining order preventing the removal of newsracks, the court said "[c]ities may curtail visual clutter, for aesthetic . . . reasons"). The aesthetic judgment is not an unfettered one. It requires a consideration of "whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses." Municipal Code of Chicago, Ill, § 10-28-160(a)(1). This standard does not threaten:

> [S]elf-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards to measure the licensor's action.

City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988). The standard therefore does not "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," and so does not cause the ordinance to be subject to a facial challenge on First Amendment grounds. *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988).

Plaintiff contends that:

> The fact that an ordinance works a prior restraint on speech gives rise to a presumption of unconstitutionality. Moreover, for a prior restraint to be sustained, it must be accompanied by adequate procedural safeguards. The ordinance must: (1) require the licensor to act on the permit in a brief specified period, (2) provide for prompt judicial review, and (3) place the burden on the licensor to institute such proceedings . . .
>
> The Amended Complaint alleges the absence of these procedural safeguards. The ordinance permits the Commissioner to deny a license and to remove unpermitted newsstands without any prior judicial review. Moreover, for applicants operating newsstands near landmarks, like the plaintiff in this case, an application will not even be considered until approved by the Landmark Commission. The ordinance does not contain any time limit within which the Commission need act.

As the prior discussion has demonstrated, this argument is wrong in its premise that the ordinance works a prior restraint on speech. It is instead a proper, content-neutral licensing scheme not subject to challenge on its face. This argument is moreover wrong on some of its facts, specifically its claim that there are no time limits for action on permits for newsstands near landmarks set forth in the ordinance. The ordinance provides:

> Any action denying or approving a permit application under subsection (a) of this section shall be made by the Commissioner of Public Works not less than 35 and not more than 65

> days after the application is filed with the Commissioner. Any action denying or approving a permit application under subsection (b) [governing renewals or previously issued permits] shall be made by the Commissioner of Public works within 10 days after the application is filed with the Commissioner.

Municipal Code of Chicago, Ill, § 10-28-160(c). The provision that plaintiff claims eliminates this time limit provides:

> Notwithstanding any provision to the contrary, any application under this subsection (a) for a newspaper stand to be located on property on which a designated landmark is situated, or on the public way between the street and the property line of such property, shall be subject to permit review by the Commission on Chicago Historical and Architectural Landmarks pursuant to Chapter 2-120 of this Code. An application for such a newspaper stand for written approval to substantially remodel such a newspaper stand shall not be considered filed with the Commissioner of Public Works until the application is approved by the Commission pursuant to that Chapter.

Municipal Code of Chicago, Ill, § 10-28-160(a). Plaintiff claims in a footnote that time limits are not supplied by the reference to the "Landmark Commission ordinance as it likewise contains no time limits." However, that ordinance provides:

> Within 15 days of its receipt of an application for a permit . . . the commission shall issue in writing a preliminary decision approving or disapproving the application . . .

Municipal Code of Chicago, Ill, § 2-120-760.

> If the commission finds that the proposed work will not adversely affect any significant historical or architectural feature of the improvement or of the district, and is in accord with the Standards for Rehabilitation set forth by the United States Secretary of the Interior at 36 C.F.R. 67, as amended from time to time, as well as the commission's published procedures, the commission shall issue a preliminary approval. Upon receipt of the commission's preliminary approval, the appropriate city department shall proceed in its usual manner with its own review of the application.

Municipal Code of Chicago, Ill, § 2-120-770.

> If the commission finds that the proposed work will adversely affect or destroy any significant historical or architectural feature of the improvement or the district, or is inappropriate or inconsistent with the designation of the structure, area or district, or is not in accordance with the spirit and purposes of this ordinance, or does not comply with the Standards for Rehabilitation established by the Secretary of the Interior, the commission shall issue a preliminary decision disapproving the application for permit. . . .

Municipal Code of Chicago, Ill, § 2-120-780.

> Within 10 days after receiving the commission's notice of preliminary disapproval, the applicant for permit may request in writing an informal conference before the commission for the purpose of securing compromise regarding the proposed work. . . . The commission shall

> hold such conference within 15 days after receipt of the request. . . .

Municipal Code of Chicago, Ill, § 2-120-790.

> If within 30 days after the conclusion of an informal conference under Section 2-120-790, the commission and applicant for permit have failed to reach accord or if the applicant fails to request an informal conference within 10 days of receiving notice as provided in Section 2-120-790, the commission shall hold a public hearing on the permit in accordance with Sections 2-120-670 and 2-120-680. The public hearing shall be concluded within 90 days after the commission has disapproved the permit unless the applicant requests or agrees in writing to an extension of time. The commission shall, within 30 days after the conclusion of the hearing, issue a written decision approving or disapproving the permit application. The decision shall contain findings of fact that constitute the basis for the decision consistent with the criteria in Section 2-120-740. The commission shall send written notice of its decision to the applicant by certified mail, return receipt requested. . . .

Municipal Code of Chicago, Ill, § 2-120-800. As can be seen from the provisions of the ordinance quoted, there are definite time limits set for decision first by the Landmark Commission and, if the application is not disapproved by the Landmark Commission, by the Commissioner of Public Works.

Moreover, plaintiff is legally incorrect on the claim that the ordinance is unconstitutional because it does not "provide for prompt judicial review, and . . . place the burden on the licensor to institute such proceedings." A

system of administrative hearing and review can be sufficient. See *Chicago Observer, Inc. v City of Chicago*, 929 F2d 325, 328 (7th Cir 1991). See also Municipal Code of Chicago, Ill, § 2-120-810 (providing that "[t]he written decision of the [Landmark] commission approving or disapproving an application for a permit under Section 2-120-800 shall be on the date it issues a final administrative decision appealable to the Circuit Court of Cook County under the provisions of the Illinois Administrative Review Act.").

In any event, even if plaintiff were correct in his claims in this argument, the principles cited with respect to prior restraints do not apply to the newsstand licensing ordinance at issue.

Plaintiff contends that the ordinance violates the first amendment by setting variable fees for permits. Plaintiff argues:

> While the City may charge a licensing fee for operation of a newsstand in a traditional public forum, it can charge no more than the cost of administering the regulatory scheme. . . . The Amended Complaint pleads a violation of this requirement in that the ordinance on its face allows for variable fees having nothing to do with the cost of administering the licensing scheme.

This argument, regardless of what its merits or lack thereof in challenging the ordinance as applied might be, does not support a challenge to the ordinance on its face. The provision of the ordinance in question states:

> The annual fee for a newspaper stand permit shall be based on the land values and the

> square footage of public property occupied by the newspaper stand, including any rack, awning, or overhang attached thereto, and shall be determined by the Commissioner of General Services in accordance with regulations promulgated by him for computing rental values for occupancies of public property. In no event shall the annual fee be less than $50; provided, however, the annual fee for a newspaper stand that is open and in operation only on Saturdays and/or Sundays shall be one-half of the fee that would otherwise be applicable.

Municipal Code of Chicago, Ill, § 10-28-165. This provision regarding fees is not content-based and does not threaten:

> [S]elf-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards to measure the licensor's action.

City of Lakewood v Plain Dealer Publishing Co., 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988). Because it does not "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," it provides no basis for a facial challenge to the ordinance on First Amendment grounds. *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 760, 108 S Ct 2138, 2145, 100 L Ed 2d 771 (1988).

Accordingly, Count I does not state a claim upon which relief may be granted. As it is apparent that plaintiff has not applied and been rejected for a permit under

the new ordinance, plaintiff cannot state a claim challenging the new ordinance on first amendment grounds, either on its face or as applied. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 US 750, 756-57, 108 S Ct 2138, 2143, 100 L Ed 2d 771 (1988). Count I will therefore be dismissed with prejudice.

With respect to Count II, plaintiff argues:

> The Amended Complaint sets fourth specific facts regarding disparate treatment of newsstands and other uses of the public way as well as between classes of permit holders. The issues raised by this challenge have not been previously litigated. They include: (1) Whether the City may require a newsstand operator to obtain approval from the Landmark Commission for operation of a newsstand at or near a designated landmark when other users of the public way under these circumstances are not required to obtain approval and (2) Whether the City may establish a size limitation when it does not establish any limitation for other uses of the public way such as sidewalk cafes.

The answer to the second question is that the city may establish a size limitation for newsstands "when it does not establish any limitation for other uses of the public way such as sidewalk cafes." See *Chicago Observer, Inc. v. City of Chicago*, 929 F2d 325, 328-29 (7th Cir 1991) (newsrack size limits which were not a part of a comprehensive beautification plan were not unconstutional). On the first question, plaintiff is once again incorrect in his statement of what the Municipal Code of Chicago provides. The Landmark Commission's review and approval, parts of which were previously quoted, is not limited solely to

newsstands. Rather, it applies generally to "alteration, construction, reconstruction, erection, demolition, relocation, or other work" in "any area, place, building, structure, work of art or, other object for which the commission has made a preliminary determination of landmark status or which has been designated as a 'Chicago Landmark' " and specifically requires the review "where a permit would allow the construction or erection of any sign or billboard within the public view which may be placed on, in, or immediately adjacent to any improvement which constitutes all or part of any landmark or proposed landmark." Municipal Code of Chicago, Ill, § 2-120-740. While there are undoubtedly some possible uses of the public way near landmarks not reviewed by the Landmark Commission under the City's ordinances, such omissions are not sufficient to render the ordinance facially invalid on equal protection grounds. Count II, making an equal protection challenge to the ordinance on its face, will be dismissed with prejudice.

Counts I and II being dismissed with prejudice, there remains no claim with respect to the new ordinance. That being the case, there is no likelihood that plaintiff will be successful on the merits of any claim that could provide the basis for enjoining enforcement of the new ordinance and, consequently, plaintiff's motion for a temporary restraining order will be denied.

With respect to Count III of the first amended complaint, the court finds that there are factual questions precluding dismissal. However, the inclusion of both the City of Chicago and Mayor Richard M. Daley in his official capacity is duplicitous, because a suit against the

mayor in his official capacity is the same as a suit against the City of Chicago. Therefore, Court III will be dismissed with respect to the claim against Mayor Richard M. Daley in his official capacity but will not be dismissed against the City of Chicago.

ORDERED: Plaintiff's motion for a temporary restraining order is denied.

Defendants' motion to dismiss plaintiff's first amended complaint is granted in part and denied in part.

The portion of the motion to dismiss directed at Counts I and II, and at the Count III's claim with respect to Mayor Richard M. Daley in his official capacity is granted. Counts I and II of the first amended complaint are dismissed with prejudice. The claim of Count III of the first amended complaint against Mayor Richard M. Daley in his official capacity is dismissed.

The portion of the motion to dismiss addressed to the claim of Count III of the first amended complaint against the City of Chicago is denied.

/s/ George W. Lindberg
George W. Lindberg
United States District Judge

Date: May 18, 1992

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1993

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA D. ROVNER, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge*

RICHARD GRAFF,	)	Appeal from the United
Plaintiff-Appellant,	)	States District Court for
No. 92-2352 *v.*	)	the Northern District of
	)	Illinois, Eastern Division.
CITY OF CHICAGO,	)	No. 91 C 1056
Defendant-Appellee.	)	**George W. Lindberg, Judge.**
	)	

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendant-appellee on March 16, 1993, and the answer of plaintiff-appellant, a vote of the active members of the Court was

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* Judge Fairchild was a member of the original panel.

requested and a majority of the judges in active service have voted to rehear this case *en banc*.

IT IS ORDERED that rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the opinion entered in this case on February 16, 1993, be, and is hereby, VACATED. This case will be reheard *en banc* at the convenience of the Court.

SUBSTITUTE ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Sections 10-28-130, 10-28-150, 10-28-160, 10-28-170, 10-28-180, and 10-28-190 of the Municipal Code of Chicago are hereby amended by adding the language underscored and deleting the language in brackets, and new sections 10-28-135, 10-28-165, 10-28-185, 10-28-191 and 10-28-192 are added to such Code, the added and amended sections to read as follows:

10-28-130. It shall be unlawful for any person to erect, locate, construct or maintain any newspaper stand on [any public place] the public way or on any other unenclosed property owned or controlled by the City without obtaining a permit therefor from the Commissioner of [Streets and Sanitation] Public Works as hereinafter provided. No new permit for a newspaper stand shall be issued on or after the effective date of this ordinance; provided that permits that have expired or have been revoked may be reissued as provided in this Article.

10-28-135. (a) Notwithstanding any provision to the contrary, all newspaper stand permits issued prior to the effective date of this section shall expire on January 1, 1992; provided that any such permit for which no newspaper stand is in existence on the effective date of this section shall expire on such effective date. Such permits may not be renewed but may be reissued by the Commissioner as provided in this Article. Notwithstanding any other provision to the contrary, any newspaper stand operated pursuant to a permit issued prior to the effective date of this section shall not be subject to the provisions of sections 10-28-165 and 10-28-170 prior to the expiration of such permit.

(b) The Commissioner of Public Works may from time to time reissue all or a portion of those permits that have been revoked or have expired. The Commissioner shall advertise in a newspaper of general circulation within the City the availability of such permits at least 10 days prior to accepting applications for the permits.

10-28-150. Application for a permit for a newspaper stand or for renewal of such permit shall be made to the Commissioner of [Streets and Sanitation] Public Works upon such form as shall be provided by him, and shall contain the name and address of the applicant, the location or proposed location of such newspaper stand, the number of daily publications and other publications that will be sold from the stand, the number of days of the week that the stand will be open and operating, and a statement that such permit will be accepted subject to the conditions and provisions thereof and subject to the conditions and provisions of all laws and ordinances affecting the maintenance of such newspaper stand now or hereafter in effect. Such application shall be signed by the applicant. The Commissioner of Public Works shall require the applicant to submit additional supporting materials reasonably necessary to determine compliance with this Code. In the case of an application that is subject to review under Section 10-28-160(a), such supporting material shall include plans, drawings, photographs and information about existing or proposed building materials and color schemes in sufficient detail to ensure compliance with this Code.

10-28-160. [Prior to issuing a permit for a newspaper stand, the Commissioner of Streets and Sanitation shall give fourteen days written notice of the proposed issuance to the alderman of the ward in which the proposed newspaper stand is to be located, and no such permit shall be issued without the approval of the City Council.]

(a) Within three business days after an application is filed with the Commissioner of Public Works for a permit for a newspaper stand, other than an application for the renewal of a permit for an existing newspaper stand, the Commissioner shall deliver a duplicate of the application to the Commissioner of Planning and to the alderman of the ward in which the newspaper stand is or will be located. Upon receipt of such application, the alderman may refer the application to the City Council's Committee on Transportation and the Public Way for the purpose of conducting public hearings on the proposed permit application. All interested persons, including the applicant, shall be given an opportunity to be heard at such hearings. After conducting such hearings, the Committee may issue a report summarizing the issues that were addressed at the hearings and recommending approval or denial of the application. Any such report must be filed with the Commissioner of Public Works not later than 30 days after the application was received by the alderman.

The Committee's report on the permit application shall be based solely on the following considerations:

(1) whether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;

(2) whether the newspaper stand complies with this Code;

(3) whether the applicant has previously operated a newspaper stand at that location;

(4) the extent to which services that would be offered by the newspaper stand are already available in the area;

(5) the number of daily publications proposed to be sold from the newspaper stand; and

(6) the size of the stand relative to the number of days the stand will be open and operating.

Any Committee report recommending disapproval of a permit application must state the specific reasons for the recommendation, which reasons shall be consistent with an applicant's constitutional rights contained in the First, Fifth and Fourteenth Amendments of the United States Constitution, and sections 2 and 4 of Article I of the Illinois Constitution of 1970.

Upon receipt of the permit application, the Commissioner of Planning shall review the application and supporting materials, and shall report to the Commissioner of Public Works his recommendation for acceptance or denial based solely upon the considerations described in paragraphs (1) through (6) of this subsection (a). Such report shall be filed with the Commissioner of Public Works within 30 days after the application was received by the Commissioner of Planning.

In acting on all applications filed pursuant to this subsection, the Commissioner of Public Works shall give due consideration to the Committee's report, if any, and to the recommendation of the Commissioner of Planning, and shall be bound by the same standards as apply to the Committee in approving or denying a permit.

Notwithstanding any other provision to the contrary, any application under this subsection (a) for a permit for a newspaper stand to be located on property on which a designated landmark is situated, or on the public way

between the street and the property line of such property, shall be subject to permit review by the Commission on Chicago Historical and Architectural Landmarks pursuant to Chapter 2-120 of this Code. An application for a permit for such a newspaper stand or for written approval to substantially remodel such a newspaper stand shall not be considered filed with the Commissioner of Public Works under this Article until the application is approved by the Commission pursuant to that Chapter.

(b) In the case of an application for renewal of a permit that has been previously issued under subsection (a), the Commissioner of Public Works shall renew the permit if he determines that the application and the newspaper stand are in compliance with this Code. If he determines that the application or newspaper stand is not in compliance with this Code, he shall deny the permit.

(c) Any action denying or approving a permit application under subsection (a) of this section shall be made by the Commissioner of Public Works not less than 35 and not more than 65 days after the application is filed with the Commissioner. Any action denying or approving a permit application under subsection (b) shall be made by the Commissioner of Public Works within 10 days after the application is filed with the Commissioner. If the Commissioner denies the application, he shall notify the applicant by mail of the reasons for his decision. Within 10 days after notice of denial of an application is sent, the applicant may request a hearing at which he will be given an opportunity to prove that the determination of the Commissioner was in error. The Commissioner of Public

Works (in cooperation with the Commissioner of Planning if the denial was based on his determination) shall schedule a hearing to be held within 30 days after he received the request.

If, after the hearing, the Commissioner of Public Works determines that his previous determination was incorrect, the Commissioner shall promptly issue or renew the permit.

(d) No newspaper stand may be substantially remodeled without prior written approval from the Commissioner of Public Works pursuant to the standards set forth in paragraphs (a)(1) and (a)(2) of section 10-28-160 and any other standards therefor promulgated by him in cooperation with the Department of Planning in furtherance of the purposes of this Article.

(e) Notwithstanding any other provision to the contrary, when two or more otherwise equally qualified applications are pending for new newspaper stands that are to be located in any area of the City in which only one new newspaper stand is permitted, preference shall be given to the application for the newspaper stand offering the largest number of different daily publications.

10-28-165. (a) The annual fee for a newspaper stand permit shall be based on the land values and the square footage of public property occupied by the newspaper stand, including any rack, awning or overhang attached thereto, and shall be determined by the Commissioner of General Services in accordance with regulations promulgated by him for computing rental values for occupancies of public property. In no event shall the annual fee be less

than $50; provided, however, the annual fee for a newspaper stand that is open and in operation only on Saturdays and/or Sundays shall be one-half of the fee that would otherwise be applicable.

(b) Such permit shall remain valid until May 1st of the year following the year in which it is issued and may be renewed as provided in this Article. Applications for renewal shall be filed pursuant to section 10-28-160(b) with the Commissioner of Public Works no later than 45 days prior to the date the permit is to expire.

10-28-170. Newspaper stands shall be constructed in accordance with the general design therefor to be approved by the Commissioner of [Streets and Sanitation and shall be uniform throughout the city] Public Works. [The dimensions of such stands shall be as follows: . . . 16 inches] The height of such stand shall not exceed 9 feet. A newspaper stand, including any rack, awning, or overhang attached thereto, may occupy no more than 120 square feet of public property.

Such stands shall be constructed [of steel] in accordance with specifications [approved by the Commissioner of Streets and Sanitation, and shall be painted and maintained in a condition satisfactory to the Commissioner] set forth in rules and regulations promulgated by the Commissioner of Public Works after consultation with the Department of Buildings.

10-28-180. The maintenance of newspaper stands [upon the public streets] subject to regulation under this Article shall be under the direction and supervision of the Commissioner of [Streets and Sanitation] Public Works.

[Nothing shall be exhibited, offered or sold from newspaper stands except daily newspapers printed and published in the city.] Each such newspaper stand must be maintained in a safe, neat and clean condition and shall be kept free of graffiti. No advertising bill, poster, card, or other advertising matter of any kind whatsoever shall be exhibited, displayed or placed on, or affixed to, any such stand. A newspaper stand shall be used for no purpose other than the exhibition and sale of newspapers, periodicals and similar publications. On the outside of each newspaper stand there shall be clearly displayed at all times a sign stating the name, business telephone number and address of the permit holder. In addition, a copy of the permit shall be displayed prominently inside the newspaper stand. Any newspaper stand that it not in compliance with this requirement shall be removed by the City pursuant to this Article.

10-28-185. (a) No newspaper stand may be erected, located or maintained if the site or location of the newspaper stand endangers public safety or property; or when such site or location is used for public utility purposes, public transportation purposes or other governmental uses; or when such newspaper stand unreasonably interferes with or impedes the flow of pedestrian or vehicular traffic, the ingress into or the egress from any residence or place of business, or the use of poles, posts, traffic signs or signals, hydrants, mailboxes, or other objects permitted at or near such location.

(b) No newspaper stand shall be situated so that the clear space for the passage of pedestrians on the sidewalk is reduced to less than 6 feet. No newspaper stand shall be placed within 3 feet of any area improved with a lawn,

flowers, shrubs or trees or within 3 feet of any display window of any building or in such manner as to impede or interfere with the reasonable use of such window for display purposes. The provisions of this subsection (b) shall not apply prior to January 1, 1992 to any newspaper stand operating pursuant to a permit issued pursuant to this Article prior to the effective date of this section.

(c) No seat, chair or canopy shall be attached to the exterior of any newspaper stand.

(d) Each newspaper stand shall be kept locked and secured when not in use.

(e) No newspaper stand shall be equipped with electricity from an outside source unless all appropriate permits therefor have been secured.

10-28-190. (a) Any permit for [the erection, location, construction, or maintenance of] a newspaper stand [on any public way or other public place may] shall be revoked by the [Mayor in his discretion] Commissioner of Public Works if:

(1) The newspaper stand is erected, located or maintained in violation of this Code or regulations adopted pursuant thereto;

(2) The newspaper stand has not been occupied and open for business purposes at any time within the previous 60 day period;

(3) The operator of the newspaper stand fails to take reasonable precautions to prevent the stand from being used for illegal activities;

(4) It is determined that the permit holder has submitted false information in or in connection with his application; or

(5) In the case of a permit for a new newspaper stand, the permit holder fails to erect a stand meeting the requirements of this Code within 90 days after the permit is issued.

(b) Before a permit is revoked pursuant to this section, notice of the revocation and the reasons therefor shall be mailed to the permit holder. Within 10 days of such notice, the permit holder may request a hearing at which he will be given an opportunity to respond to the allegations in the complaint. If no request for a hearing is made within such 10 day period, the permit shall be revoked. If such a request is made, a hearing shall be scheduled by the Commissioner of Public Works within 30 days after receiving the request. If, after the hearing, the Commissioner determines that the allegations in the notice of revocation are true, he shall revoke the permit and order the newspaper stand removed. Within 15 days after the permit for a newspaper stand has been revoked, the former permit holder shall remove the newspaper stand from the public way or other public property and repair any damage to the property caused by the installation or removal of the stand. If such action is not taken by the former permit holder, the City shall cause the removal and repairs to be made and may collect from the former permit holder an amount equal to the amount of the City's expenses for such removal and repair.

(c) In addition to any other authority given to the Commissioner pursuant to this section, the Commissioner

shall cause the removal of any newspaper stand on the public way or on any other unenclosed property owned or controlled by the City for which no valid permit is in effect. Prior to doing so, the City shall post a notice on the stand stating that the stand must be removed and the public property restored to its original condition within 15 days after the date of the notice. If the name and address of the owner or operator of the newspaper stand is known to the Commissioner, a copy of the notice shall be mailed to that person. The notice shall also state that the owner or operator of the stand may request a hearing to demonstrate compliance with this Article by filing such request in writing with the Commission within the 15 day period. If the stand is not removed and no such request is filed within the 15 day period, the City shall cause the removal and repairs to be made and may collect from the owner or operator an amount equal to the amount of the City's expenses for such removal and repairs. If a timely request for a hearing is filed, a hearing shall be scheduled by the Commissioner within 30 days after the request is made. If, after the hearing, the Commissioner determines that the newspaper stand is not in compliance with this Article, he shall order the stand removed and the public property repaired within 15 days. If the stand is not removed and the repairs are not made within such 15 day period, the City shall cause the removal and repairs to be made and may collect from the owner or operator an amount equal to the City's expenses for such removal and repairs.

(d) Notwithstanding any provisions to the contrary, the City may remove summarily any newspaper stand that poses an immediate threat to the health or safety of

the public. Within 15 days after taking such action, the Commissioner shall notify by mail the holder of the permit for the newspaper stand (or, if there is no such permit and the identity and address of such person may be reasonably ascertained, the owner of the newspaper stand) of the action taken and the reasons therefor. Within 10 days after such notification is made, the permit holder or newspaper stand owner may request a hearing for the purpose of determining whether the newspaper stand was in violation of this Article. If after such hearing, or if no timely request is made, the Commissioner determines that such a violation did occur, the Commissioner shall revoke the permit for the newspaper stand, if any, and the permit holder or newspaper stand owner shall be required to pay the City an amount equal to the amount of the City's expense in removing the newspaper stand and making necessary repairs.

(e) Any salvageable portion of a newspaper stand removed by the City pursuant to this Article, and any contents of such stand, shall be stored by the City for a period of 30 days. The owner of the stand may reclaim the property within such 30 day period by paying to the City all amounts payable to the City for its expenses in removing the stand and repairing the public property, plus a $50 storage fee. Any property that is not so reclaimed shall be disposed of as unclaimed property.

10-28-191. The Commissioner of Public Works shall have the authority to adopt such orders, rules and regulations as he may deem necessary for the proper administration and enforcement of the provisions of this Article.

10-28-192. The provisions of sections 10-28-130 through 10-28-192 are severable. If any section, clause, provision, portion or application of those sections is determined by any court to be invalid for any reason, the validity of the remaining sections, clauses, provisions or portions, and their application to other circumstances, shall not be affected thereby. It is the intention of the City Council that those sections would have been enacted by the City Council regardless of the invalid sections, clauses, provisions, portions or applications.

SECTION 2. This ordinance takes effect 60 days after its passage and publication.

Supreme Court, U.S.
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No. 93-1523

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD GRAFF,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an ordinance requiring an operator of a newsstand to obtain a permit to erect a stand on public property should be analyzed as a prior restraint.

2. Whether the City of Chicago's newsstand ordinance, which requires applications for newsstand permits to be considered within a specified period of time under a set of six binding criteria, and which affords applicants prompt judicial review of adverse decisions, is an invalid prior restraint.

3. Whether the six binding criteria for evaluating applications for newsstand permits under the City of Chicago's newsstand ordinance confer such broad discretion on municipal officials that the ordinance should be considered an invalid prior restraint.

4. Whether an ordinance regulating newsstands that is found to be consistent with the First Amendment must nevertheless be subjected to heightened scrutiny under the Equal Protection Clause on the basis that it affects a fundamental right.

5. Whether the district court should have held an evidentiary hearing on whether the City of Chicago's ordinance regulating the number and size of newsstands within the City, and the activities that may be conducted at newsstands, in fact advances legitimate interests in regulating the time, place, and manner of activities on the public ways.

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---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting en banc, Pet. App. 1-79, is reported at 9 F.3d 1309. The opinion of the panel of the court of appeals, Pet. App. 80-136, is reported at 986 F.2d 1055. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Pet. App. 137-54, is reported at 800 F. Supp. 576.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1993. On February 10, 1994, Justice Stevens entered an order granting petitioner an additional 30 days in which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Richard Graff ("Graff") operates a newsstand on public property in front of the City of Chicago's Cultural Center. Since Graff bought the newsstand in 1984, he has never held a permit to operate it. Graff applied for a permit several times thereafter, and each time the City informed him that it would not issue any permits because its newsstand ordinance was under review.[1] In 1990, Graff filed this lawsuit challenging the City's refusal to issue him a permit. Some four months later, the Chicago City Council enacted the ordinance at issue.

The City's new newsstand ordinance requires all newsstands on unenclosed municipal property to have a permit. See Municipal Code of Chicago, Ill. § 10-28-130 (1991).[2] The ordinance limits the size of newsstands (see *id.* § 10-28-170) and requires them to observe set-back rules from parkways and display windows and to leave at least six feet of pedestrian passage on the sidewalk (see *id.* § 10-28-185(b)). Newsstands must be used solely for "the exhibition and sale of newspapers, periodicals, and similar publications." *Id.* § 10-28-180.

Permits under the ordinance are issued by the City's Commissioner of Public Works. The Commissioner has authority to issue as many permits as were in existence on the effective date of the ordinance. See Municipal Code of Chicago, Ill. §§ 10-28-130 & -135 (1991). The Commissioner must act on a permit application within 65 days. See *id.* § 10-28-160(c). If an application is denied, the applicant has 10 days to seek reconsideration at a formal hearing; the Commissioner then has 30 days to

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[1] The ordinance then in effect left the decision whether to issue a permit for a newsstand to the unfettered discretion of the City Council, and the decision whether to revoke a permit to the unfettered discretion of the Mayor. See Pet. App. 2.

[2] The ordinance can be found at Pet. App. 157-69.

hold a hearing. See *ibid.* In evaluating a permit application, the Commissioner must decide on the basis of six criteria:

> (1) Whether the design, materials and color scheme of the newsstand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses;
>
> (2) Whether the newsstand complies with this Code;
>
> (3) Whether the applicant has previously operated a newsstand at that location;
>
> (4) The extent to which the services that would be offered by the newsstand are already available in the area;
>
> (5) The number of daily publications proposed to be sold from the newsstand; and
>
> (6) The size of the stand relative to the number of days the stand will be open and operating.

Id. § 10-28-160(b).[3]

Once an applicant receives a permit, it is entitled to have the permit renewed annually so long as the newsstand remains in compliance with the ordinance. See Municipal Code of Chicago, Ill. § 10-28-160(b) (1991). A permit may be revoked only if the newsstand violates the rules contained in the ordinance, if it has been abandoned, if the owner permits it to be used for illegal purposes, if it is determined that the permit holder submitted false information in its permit application, or if the permit holder fails to erect a lawful newsstand within 90 days of the issuance of the permit. See *id.* § 10-28-190.

Graff amended his complaint to attack the new ordinance as facially unconstitutional and sought a prelimi-

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[3] An application for a newsstand to be located on property with a designated landmark must also be approved by the Commission on Chicago Historical and Architectural Landmarks under the criteria applicable to it. Municipal Code of Chicago, Ill. § 10-28-160(a).

nary injunction preventing the City from removing his newsstand at the Cultural Center. See Pet. App. 137. The district court dismissed the counts of Graff's complaint attacking the new ordinance and denied his request for preliminary injunctive relief as moot. The court concluded that the ordinance should be analyzed as a regulation of the time, place, and manner of speech, and that, as so analyzed, the ordinance contained reasonable regulations for the operation and maintenance of newsstands. Pet. App. 138-53.

Graff appealed the denial of his motion for an injunction, and a divided panel of the court of appeals reversed.[4] The panel majority first concluded that the First Amendment secures the right to place a structure on the public way to sell periodicals and other materials protected by the First Amendment. Pet. App. 87-93. Second, the majority concluded that the ordinance constituted a prior restraint because the Commissioner might not follow the criteria in the ordinance, but instead could use them as a pretext for content discrimination. Pet. App. 96-98. Finally, the majority concluded that this prior restraint was not accompanied by adequate procedural safeguards, because although dissatisfied applicants could obtain judicial review in state court, the possibility of subsequent review was not sufficient to circumscribe adequately the Commissioner's discretion. Pet. App. 99-100. Judge Manion filed a lengthy dissent. Pet. App. 110-36.

The City sought and obtained rehearing en banc, and the en banc court affirmed the judgment of the district court by a vote of 9-3. Writing for a 5-judge plurality, Judge Manion concluded, first, that prior restraint doctrine was not implicated by this case because Graff had no protected right to erect a structure on public property and

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[4] The panel concluded that it had jurisdiction over Graff's appeal under 28 U.S.C. § 1292(a)(1) (see Pet. App. 82-85), a conclusion the en banc court embraced as well (see Pet. App. 6-7).

hence the City had restrained nothing that is protected by the First Amendment (Pet. App. 8-17); second, that the criteria in the ordinance sufficiently cabined the Commissioner's discretion (Pet. App. 17-21); third, that the restrictions in the ordinance constituted reasonable regulations of the time, place, and manner of expressive activity (Pet. App. 22-29); fourth, that the limitations on the time during which an application may remain pending and the availability of prompt judicial review of applications that were denied provided adequate procedural safeguards on the application process (Pet. App. 32-38); and fifth, that the ordinance comported with equal protection because it infringed no fundamental First Amendment right and contained reasonable regulations for newsstands (Pet. App. 38-41). Judge Flaum, joined by Judge Cudahy, concurred in the result, concluding that although the ordinance was appropriately analyzed under prior restraint doctrine, it was valid because the ordinance sufficiently cabined the discretion of municipal officials and contained appropriate procedural safeguards. Pet. App. 43-58. Judge Ripple, joined by Judge Cudahy and Judge Rovner, also concurred in the result, concluding that when, as here, an ordinance does not grant unbridled discretion to a municipal licensing official, it should be analyzed as a regulation of the time, place, or manner of speech, rather than as a prior restraint. Pet. App. 59-64. Judge Cummings, joined by Judge Bauer and Judge Fairchild, dissented. Pet. App. 65-79.

ARGUMENT

Although the City of Chicago has chosen not to prohibit newsstands on public property, neither do we choose to permit their erection anywhere within the City by anyone interested in operating a rent-free store on public property. The City's ordinance reflects instead a middle ground, permitting newsstands on public property only if an applicant can demonstrate that it satisfies content-neutral criteria for determining where and how newsstands may operate. Graff strains to shoehorn his case into First Amendment prior restraint doctrine, but that shoe will not fit. Graff has no right to erect a store on public property merely because he plans to sell materials that are protected by the First Amendment there; hence the ordinance "restrains" nothing that is protected by the First Amendment. In any event, because the ordinance contains substantial limitations on the discretion of licensing officials and substantial procedural safeguards that accompany the exercise of that discretion, it passes muster even if analyzed under prior restraint doctrine. The ordinance's limitations on the size, placement, and number of newsstands have no impact on what ideas or views may be disseminated within the City of Chicago and are an appropriate regulation of the time, place, and manner of expressive activities. These reasonable regulations are consistent with the First Amendment. Absent any infringement of a fundamental right, the ordinance comports with the Equal Protection Clause as well.

Graff identifies no decision of this Court that grants him a right to erect a store on public property without seeking advance permission, nor any decision that condemns the type of circumscribed discretion conferred upon the Commissioner under this ordinance. Nor does Graff identify any decision of another circuit even close to being on point, much less one that reaches a result inconsistent with that reached below. While the Seventh Circuit's well-reasoned discussion of the law of prior restraint will no doubt prove useful to other courts, the

decision below makes no new law, creates no conflict in the circuits, and ultimately turns on the highly specific details of the particular ordinance at issue. There is thus no basis for plenary review by this Court.

1. Graff mischaracterizes the conclusion of the plurality below when he argues that the plurality "decided that the First Amendment is not implicated in this case because: '[t]he building of a newsstand is simply not a form of constitutionally protected expression.'" Pet. 9 (quoting Pet. App. 10-11). To the contrary, the plurality's opinion contains an extensive discussion of the First Amendment standards that it concluded were applicable to the ordinance. See Pet. App. 17-38. The plurality held only that "[r]equiring a permit for the structure is not a prior restraint on speech." Pet. App. 10. That ruling is plainly correct because the First Amendment's guarantee of freedom of speech does not secure for Graff a right to erect a newsstand on public property.

The First Amendment presumptively protects the right to speak or demonstrate on the public ways (*e.g., United States v. Grace*, 461 U.S. 171, 176-78 (1983)), as well as the right of persons to engage in communicative activities regardless of the content of the communication (*e.g., Texas v. Johnson*, 491 U.S. 397, 406-07 (1989)). Thus, an ordinance requiring prior governmental approval of the content of communication before one may engage in activities protected by the First Amendment is properly characterized as a prior restraint. See, *e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (ordinance requiring license to engage in public demonstrations); *Freedman v. Maryland*, 380 U.S. 51 (1965) (statute requiring license before exhibiting a movie). Such ordinances "restrain" the exercise of some right protected by the First Amendment. But this is not such an ordinance. This ordinance requires prior governmental approval to erect a permanent structure. This Court has squarely rejected the claim that requiring a permit before a business can open amounts to a prior restraint when that business

plans to engage in expressive activities. In *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), the Court held that an ordinance requiring licenses to open adult movie theatres was not a prior restraint: "The mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances . . . . The City's interest in planning and regulating the use of property for commercial purposes is clearly adequate to afford that kind of restriction . . . ." *Id.* at 62-63. This Court has never held that the First Amendment protects the right to erect a permanent structure on public property, nor has it applied prior restraint doctrine to ordinances regulating those who seek to place their expressive materials on public property. Rather, the Court has examined such limitations on the use of public property as regulations of the time, place, or manner of speech. See, *e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Members of Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

In arguing that this ordinance should be analyzed as a prior restraint, Graff relies on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). That case considered an ordinance that required permission from the city's mayor to place newspaper vending machines on public property. The Court held that the ordinance was invalid because it contained no neutral standards governing the issuance of permits, not because it was a "prior restraint." See *id.* at 757-59, 769-70. The precise holding in *Lakewood* was that the ordinance could not be upheld as a content-neutral time, place, or manner regulation because it afforded "unbridled discretion" to the mayor. See *id.* at 762-68. *Lakewood* is not authority for the proposition that an ordinance prohibiting the placement of structures on public property without advance permission that is granted or withheld pursuant to content-neutral criteria "restrains" anything that is pro-

tected by the First Amendment; indeed the Court expressly declined to decide whether the First Amendment protects the right to place newspaper vending machines on public property. See *id.* at 762 n.7.[5]

Here, as we explain below, the ordinance at issue does not grant "unbridled discretion" to the Commissioner, and hence does not run afoul of *Lakewood*. The courts of appeals have consistently analyzed ordinances that contain specified criteria governing the exercise of discretion as regulations of the time, place, and manner of speech, and not as prior restraints. See, *e.g.*, *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577-78 (9th Cir.), cert. denied, 114 S. Ct. 306 (1993); *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1326-28 (1st Cir. 1993); *Paulsen v. Gotbaum*, 982 F.2d 825, 828 (2d Cir. 1992); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1134-36 (6th Cir.), cert. denied, 112 S. Ct. 275 (1991); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220-21 (10th Cir. 1990). Not surprisingly, then, Graff does not attempt to argue that the decision below is inconsistent with any other decision in the lower courts.

In any event, this aspect of the plurality's opinion was not material to the disposition of this case. The plurality went on to consider the ordinance under prior restraint doctrine and concluded that the ordinance was not an invalid prior restraint. See Pet. App. 17-21, 32-38. Moreover, two of the four concurring judges also concluded that the ordinance passed muster under prior restraint doctrine. See Pet. App. 43-58. Accordingly, the question whether prior restraint doctrine should be applied to this ordinance does not merit plenary review.

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[5] Moreover, as the Seventh Circuit plurality pointed out, even if *Lakewood* had decided this question with respect to newspaper vending machines, this ordinance would pose a very different question. Because newsstands are much larger than newspaper vending machines, they intrude more deeply on the legitimate governmental interest in avoiding undue obstruction of the public way, and thus they have a far weaker claim to public property. See Pet. App. 8-17.

2. Even if the City's newsstand ordinance is analyzed as a prior restraint, the ordinance would nevertheless be valid if it were accompanied by adequate procedural safeguards. See, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). In *Freedman v. Maryland*, the Court identified three safeguards that must accompany any regulation requiring issuance of a permit for the exhibition of a movie: first, any restraint may be imposed only for a specified brief period of time during which the status quo is preserved; second, prompt judicial review of the licensing official's decision must be available; and third, the licensing officials must bear the burden of going to court to obtain judicial review and must bear the burden of proof in judicial proceedings. See 380 U.S. at 58-60. Graff argues that the newsstand ordinance fails this test because "[t]here is no provision to ensure prompt judicial review of the administrative decision and no provision preserving the status quo." Pet. 16.

This submission ignores this Court's holding in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), which modified the *Freedman* test for cases like this one. *FW/PBS* involved a Dallas ordinance requiring adult-oriented businesses to obtain licenses before they could operate. A majority of the Court held that all three prongs of the *Freedman* test were unnecessary. *Freedman* was not controlling because under the Dallas ordinance no licensing official passed directly on the content of an applicant's speech, and because applicants seeking to go into business have adequate incentives to initiate judicial proceedings. See 493 U.S. at 229-30 (plurality opinion); *id.* at 245-48 (White, J., concurring in part and dissenting in part). A majority of the Court concluded that *Freedman* did not require the City to initiate judicial review or to preserve the status quo during review; that majority concluded that in the business licensing context, prior restraint doctrine requires, at the most, that there be a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt

judicial review." *Id.* at 230; see also *id.* at 245-48 (White, J., concurring in part and dissenting in part).

The plurality below correctly applied the holding of *FW/PBS* to our newsstand ordinance. Under the ordinance, the Commissioner is not granted authority to review the content of periodicals distributed at a newsstand, and an applicant who wishes to obtain a permit in order to go into business has every incentive to seek judicial review promptly. Hence, as in *FW/PBS*, the First Amendment requires only a limitation on the time a permit application can remain pending and the availability of prompt judicial review. Here, the ordinance expressly limits to 65 days the time in which a permit application can remain pending; and Graff does not argue that the ordinance does not comply with this prong of *FW/PBS*. While Graff does complain that no "swift" judicial review is available (Pet. 16), he does not discuss the court of appeals' analysis of the availability of the common law writ of certiorari under Illinois law, which provides aggrieved applicants a judicial forum. See Pet. App. 36-38. Under Illinois law, decisions of municipal officials that are not expressly made reviewable by state law are reviewable of right by common law certiorari. *E.g.*, *Nowicki v. Evanston Fair Housing Review Board*, 338 N.E.2d 186 (Ill. 1975). This review "extends to all questions of law and fact presented by the record." *Howard v. Lawton*, 175 N.E.2d 556, 557 (Ill. 1961). A disappointed applicant thus may immediately seek a writ of certiorari, as well as any preliminary injunctive relief that may be warranted. Accordingly, swift and fully effective judicial review is available to disappointed applicants for newsstand permits. Graff identifies no decision of any lower court that is inconsistent with the decision below on this point.

Moreover, once again this aspect of the plurality's opinion was not necessary to the disposition of this case below. The plurality, as well as the four concurring judges, also concluded that the ordinance was not an

invalid prior restraint because it sufficiently cabins the Commissioner's discretion when reviewing applications. See Pet. App. 17-21 (plurality opinion), 47-58 (Flaum, J., concurring), 60-64 (Ripple, J., concurring).[6] Thus, the question whether the ordinance also complies with *Freedman* is not dispositive here, and in any event does not merit plenary review.

3. Graff contends that the newsstand ordinance is an invalid prior restraint because it creates "the vice of standardless discretion." Pet. 17. The court below, however, correctly concluded that because the ordinance does not delegate to a licensing official discretion to act on the basis of the content of protected speech, much less "unbridled" discretion, it is not an unlawful prior restraint.

Graff is correct that the ordinance vests a modicum of discretion in the Commissioner of Public Works to decide how many newsstand permits to issue and how to evaluate applications under the criteria contained within the ordinance. The mere existence of discretion, however, does not create a prior restraint if the discretion conferred does not permit a licensing official to act on the basis of the content of protected speech. That has been clear at least since *Cox v. New Hampshire*, 312 U.S. 569 (1941), in which the Court upheld an ordinance requiring a permit for parades. The Court reasoned that a city may exercise discretion when evaluating a request to engage in protected activity on the public ways as long as that discretion is limited to regulating the time, place, or manner of speech. See *id.* at 574-76. See also *Heffron*

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[6] Graff contends that *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), held that procedural safeguards are required even in the absence of standardless discretion, but the court there did no such thing. It struck down a newspaper vending machine permit system because it created "completely standardless and unfettered discretion" (*id.* at 1199), and held only that "some minimal procedures and standards are required to channel the discretion of [the] officials." *Id.* (footnote omitted).

v. International Society for Krishna Consciousness, 452 U.S. 640, 647 n.10 (1981). Thus, an individual may not "challenge as censorship any law involving discretion to which [he] is subject. The law must have a close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 759. This nexus does not exist when a licensor can consider only the time, place, or manner of communicative activities. Rather, it is present only when a licensing authority has such broad discretion that it may act on the basis of the content of an applicant's speech: "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757. Accord, *e.g.*, *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2402-03 (1992); *FW/PBS*, 493 U.S. at 225-26 (plurality opinion); *Shuttlesworth v. City of Birmingham*, 394 U.S. at 151.

Neither of the two aspects of the Commissioner's discretion about which Graff complains has any nexus to expression. There is no threat of censorship in the decision how many permits to issue. See Pet. 18-19. The Commissioner must decide whether to make permits available before he even receives applications, and applicants are not required to identify the periodicals they will sell at a proposed newsstand in their applications.[7] Thus the Commissioner has no vehicle for reviewing the content of periodicals to be distributed at a newsstand. Similarly, the Commissioner's discretion to determine "whether the design, materials, and color scheme of the newsstand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses," provides no authority over the content of periodicals. Pet. 19 (citing ordinance). This and the other binding criteria hardly afford "unbridled discretion."

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[7] What is more, since most applicants will not be operating a newsstand at the time they apply, it will not be possible to visit the stand and determine what periodicals the applicant is distributing.

And once an applicant receives a permit, it is entitled to renewal as long as the newsstand remains in compliance with the law. In particular, permits cannot be revoked to punish applicants for distributing disfavored materials. Thus, the ordinance does not permit the Commissioner to exercise "unbridled" or "censorial" power.

Moreover, the two particular aspects of the ordinance to which Graff objects are amply justified by legitimate and content-neutral governmental interests. The City's aesthetic interest in avoiding visual clutter on its public ways is unquestionably legitimate (*e.g., Taxpayers for Vincent*, 466 U.S. at 805-07, 810, 816-17), and is plainly broad enough to comprehend the Commissioner's power to assess the design of a newsstand. If the Commissioner somehow learns which applicants intend to distribute disfavored publications—whatever they are—and uses the aesthetic criterion as a pretext for denying all these applications, that pattern will quickly become evident.

Similarly, a cap on the number of permits also serves the City's interest in reducing visual and physical clutter on its property. The Commissioner had discretion to decide how many permits he will issue; the decision is made before he even knows the identity of an applicant; and hence cannot be based on the content of protected speech. And what is more, the validity of the permit cap or the way it is set is immaterial to the disposition of this case. Graff applied for permits for two newsstands at the Chicago Cultural Center, a landmarked building. Those applications were denied not because no further permits would be issued, but because the Commission on Chicago Historical and Architectural Landmarks determined that a newsstand at that location would compromise the architectural integrity of the Cultural Center. Pet. App. 5.[8] Accordingly, Graff cannot obtain the in-

[8] Graff has never attacked the Commission's decision or mounted any other type of challenge to the ordinance as applied to him. He has only attacked the ordinance on its face.

junction at issue by challenging the permit cap. His applications were denied without reference to that limitation, and a litigant may not obtain an injunction unless it identifies an injury it has suffered as a result of the challenged conduct that will be redressed by a favorable decision. See, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Graff's newsstand would have to be removed even if he succeeded in invalidating this aspect of the ordinance, and thus this feature of the ordinance provides no basis for reversing the judgment below denying Graff injunctive relief.[9]

In short, the newsstand ordinance is not an unlawful prior restraint. It contains no "unbridled discretion," no avenue for the Commissioner to review the content of materials distributed at newsstands, and no mechanism for revoking or failing to renew a permit if an applicant distributes a disfavored publication. Indeed, a newsstand ordinance can never be much of a device for censorship. Since newsstands are not identified with any particular publication, denying permits for all newsstands that carry a particular disfavored publication is "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Lakewood*, 486 U.S. at 761. Such a course of action would hardly be practical, and its motivation would quickly become apparent.

As we point out above, the courts of appeals have uniformly held that when an ordinance limits the discretion of licensing officials to act on the basis of content, it should not be analyzed as a prior restraint. The binding criteria in the ordinance do just that. While Graff cites *Miami Herald Publishing Co. v. City of Hallendale*, 734 F.2d 666, clarified, 742 F.2d 590 (11th Cir. 1984), he does not argue that that decision is inconsistent with the holding below (see Pet. 22), and indeed it is not. In that case, the court struck down a permit scheme governing newspaper vending machines because the ordinance

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[9] The ordinance contains a comprehensive severability clause. See Municipal Code of Chicago, Ill. § 10-28-192 (1991).

was so vague that applicants could not determine with which provisions of the city's code they would be expected to comply. See 734 F.2d at 674-75. Graff has never forwarded any such attack against the ordinance at issue here.[10] The decision below accordingly is consistent with this Court's precedents, creates no conflict in the circuits, and is ultimately based on the quite specific aspects of the particular ordinance at issue. There is accordingly no basis for this Court's plenary review.

4. Graff argues that the court below should have sustained his challenge to the ordinance through some form of heightened judicial scrutiny applicable under the Equal Protection Clause because the ordinance "burdens the exercise of a fundamental right." Pet. 23. The Equal Protection Clause, however, "requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right. . . ." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1975) (per curiam). Once the court below determined that the ordinance was consistent with the First Amendment, and contained only reasonable regulations of the time, place, and manner of expressive activity, it follows that the ordinance is sufficiently rational to survive equal protection scrutiny as well. See, *e.g.*, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344 n.9 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 42, 55 n.4 (1986).

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[10] Graff also cites two other decisions (see Pet. 22), although the proposition for which they are cited is unclear. In *Leonardson v. City of East Lansing*, 896 F.2d 190 (6th Cir. 1990), the court condemned an ordinance that gave the police broad discretion to prevent demonstrations or other public gatherings that posed no imminent threat of unlawful activity. See *id.* at 197-99. In *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. Unit A 1981), the court invalidated a similar ordinance granting licensing officials the power to deny parade permits because of their fear of unlawful activity, again without any imminent likelihood of such activity. See *id.* at 509-10. Plainly, neither holding is inconsistent with the decision below.

To support his claim of unconstitutional discrimination, Graff contends that the City treats applications for sidewalk cafes more favorably than newsstand permit applications. There is no factual support for that conclusion. No sidewalk cafe may open unless the City Council enacts an ordinance authorizing its operation, and the Council has unfettered discretion to refuse to enact the ordinance. See Municipal Code of Chicago, Ill. § 4-384-020 (1991). Even if an ordinance is enacted, the City's Commissioner of Consumer Services may refuse to issue a license if the proposed cafe interferes with pedestrian traffic or access to a building, threatens pedestrian and traffic safety, or is not aesthetically compatible with the surrounding area. See *id.* § 4-384-060. Thus, the ordinance leaves the City with far more discretion to deny a sidewalk cafe application than to deny a newsstand application. The City does not discriminate against newsstands.[11]

5. With respect to the court of appeals' analysis of the ordinance under time, place, or manner doctrine, Graff does not argue that the City's ordinance is not facially valid as a reasonable regulation of the time, place, or manner of speech; instead he argues that the district court should have held a hearing to assess the strength of the City's justifications for limiting the number and size of newsstands. See Pet. 27-28. Graff relies on *City*

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[11] The equal protection precedents on which Graff relies all concerned ordinances that allegedly violated the First Amendment. These courts applied heightened scrutiny only in analyzing the claim that the ordinance did in fact impermissibly infringe First Amendment rights. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 480, 494-96 (1986) (claim that city had unjustifiably prevented cable operator from doing business in violation of First Amendment); *Minneapolis Star & Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575, 582-93 (1983) (state tax that discriminated against newspapers in violation of First Amendment); *Sentinel Communications Co. v. Watts*, 936 F.2d at 1206-07 (liability insurance requirement that discriminated against newsracks in violation of First Amendment).

of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), in which the Court required the city to adduce evidence supporting its contention that it had a legitimate interest in permitting only one cable television company to lease space on utility poles. Thus, the Court required an evidentiary hearing because the need for limiting access to utility poles was open to fair dispute. See *id.* at 494. That is simply not true here.

In *Preferred Communications*, the city attempted to justify its refusal to permit Preferred to operate a cable television system on the basis that there was limited space on its utility poles, but there was a genuine dispute about how limited that space was. See 476 U.S. at 491. Hence the Court needed to "know more about the present uses of the public utility poles and rights-of-way and how [Preferred] proposes to install and maintain its facilities on them." *Id.* at 495. Here, the City has relied only on the indisputable proposition that more and larger newsstands add clutter to the public ways. As the majority below correctly held, this common sense conclusion is self-evident, and hence no evidentiary hearing need be held to prove the obvious. See Pet. App. 31-32. In *Taxpayers for Vincent*, for example, the Court upheld an ordinance prohibiting the placement of signs on utility poles without requiring a trial, writing that "we accept the City's position that it may decide that aesthetic interest in avoiding 'visual clutter' justifies a removal of signs creating or increasing that clutter." 468 U.S. at 816. The same is true here. More and larger newsstands unquestionably increase the problem of visual and physical clutter. Accordingly, there can be no fair dispute about whether the City's limitation on the number and size of newsstands directly advances its legitimate interest, which is all that is required to uphold an ordinance as a reasonable regulation of the time, place, or manner of speech. See, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 797-802 (1989). Nothing in *Preferred Communications*

requires a district court to hold a trial the outcome of which is foreordained.[12]

Graff also complains about the ordinance's requirement that newsstands distribute only periodicals, thereby excluding other "expressive materials" that Graff would like to sell. See Pet. 29. But again, the legitimacy of the City's interest is readily apparent. Requiring licensed newsstands to be newsstands in fact, and not mini-marts offering books, video tapes, T-shirts, and any other imaginable "expressive materials" plainly serves "the legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.' " *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 50-51 (1983) (quoting *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129-30 (1981)). See also *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2706 (1992). Moreover, as the court below correctly concluded, the availability of all manner of "expressive materials" at newsstands would result in more time-consuming purchases and more obstruction of pedestrian traffic flow. See Pet. App. 26.[13]

Not only is there no disagreement in the lower courts on this issue, but even the dissenting judges below did not fault the district court for failing to hold an evidentiary hearing. And in any event, the validity of the re-

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[12] *754 Orange Ave. v. City of West Haven*, 761 F.2d 105 (2d Cir. 1985), is distinguishable for the same reason as *Preferred Communications*. There it was fairly open to dispute whether adult bookstores had the adverse effects on the surrounding community that the city claimed. See *id.* at 111.

[13] Graff cites *Gaudiya Vaishnava Society v. City and County of Dallas*, 952 F.2d 1059 (9th Cir. 1990), cert. denied, 112 S. Ct. 1951 (1992), but that decision is far afield. There the court held only that a permit scheme governing the sale of items for charitable purposes was invalid because it gave "unbridled discretion" to the chief of police to decide whether to issue permits. See *id.* at 1062-63, 1065.

strictions on what may be sold at a newsstand is immaterial to the disposition of this case. As we point out above, Graff's applications were denied because of the impact of the proposed newsstands on the adjoining landmarked property, and not because of what he wished to sell. Thus, invalidation of this aspect of the ordinance would not entitle Graff to the injunction at issue in this case. This issue provides no basis for plenary review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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